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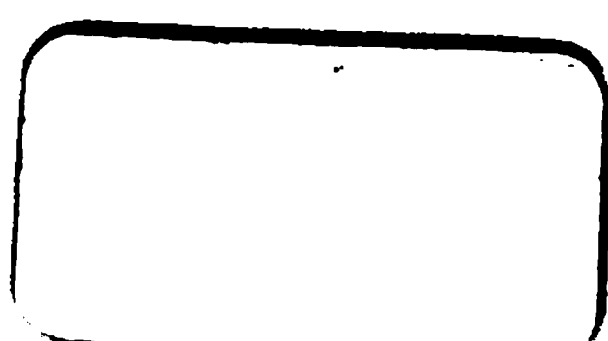
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OHIO
CIRCUIT COURT REPORTS

NEW SERIES. VOLUME XVIII.

CASES ADJUDGED
IN
THE CIRCUIT COURTS OF OHIO.

VINTON R. SHEPARD, EDITOR.

CINCINNATI:
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1914.

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JUDGES OF THE CIRCUIT COURTS OF OHIO.

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HON. PHILLIP M. CROW, *Secretary*, Kenton.

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PETER F. SWING Cincinnati
EDWARD H. JONES Hamilton
OLIVER B. JONES Cincinnati

SECOND CIRCUIT.

*Counties—Champaign, Clark, Darke, Fayette, Franklin, Greene,
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ALBERT H. KUNKLE Springfield

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*Counties—Allen, Auglaize, Crawford, Defiance, Hancock, Hardin,
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Union, Van Wert and Wyandot.*

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W. H. KINDER Findlay
PHILLIP M. CROW Kenton

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CHARLES E. CHITTENDENToledo

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CHARLES R. GRANTAkron

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OHIO CIRCUIT COURT REPORTS

NEW SERIES—VOLUME XVIII.

CASES ARGUED AND DETERMINED IN THE CIRCUIT
COURTS OF OHIO.

PROSECUTION FOR ABETTING AND PROCURING PERJURY.

Circuit Court of Cuyahoga County.

ULYSSES G. WALKER V. STATE OF OHIO.

Decided, May 21, 1910.

*Criminal Law—Sufficiency of Indictment for Aiding, Abetting and
Procuring Perjury—Particular Form of Words Not Necessary in
Taking Oath—Exaggeration in Argument to Jury.*

1. In an indictment for aiding, abetting and procuring another to commit perjury, the fact that the accused knew that the person whom he aided knew that he was committing perjury is sufficiently alleged by charging that the accused willfully and corruptly aided, abetted and procured the other in making, verifying and falsely swearing to a bank report, "then and there well knowing said report to be false and untrue, and thereby to commit willful and corrupt perjury in the manner and form as aforesaid."
2. One may be found guilty of aiding and abetting the commission of perjury, though the evidence does not show that he was personally present when the perjury was committed.
3. No particular form of words is necessary to the taking of an oath if both the officer who administers it and the person taking it, understand that an oath is being administered.
4. Picturesque and exaggerated language used by counsel for the state in addressing the jury in a criminal case does not necessarily require a reversal of a conviction.

Norton T. Horr and Jay P. Dawley, for plaintiff in error.
John A. Cline and Walter D. Meals, contra.

MARVIN, J.; WINCH, J., and HENRY, J., concur.

The plaintiff in error was tried and convicted in the court of common pleas of the crime of perjury. The claim on the part of the state being that he aided, abetted and procured one William G. Duncan to knowingly swear falsely in a certain affidavit which was made as to the truth of a certain report, made to the superintendent of banking of the state of Ohio, the said Walker being the president and the said Duncan the treasurer of a banking company known as "the South Cleveland Banking Company." The statute defining perjury and providing for its punishment is Section 6897, Revised Statutes, and reads:

"Whoever either verbally or in writing, on oath lawfully administered, willfully and corruptly states a falsehood as to a material matter in a proceeding before a court, tribunal or officer created by law, or matter in relation to which an oath is authorized by law, is guilty of perjury and shall be imprisoned in the penitentiary not less than three years nor more than ten years."

There is no statute making a separate crime of subornation of perjury, but Section 6804 of the Revised Statutes reads:

"Whoever aids, abets or procures another to commit any offense may be prosecuted and punished as if he were the principal offender."

So that if any offense is charged here against Walker it is a charge of perjury, and results from his suborning Duncan to knowingly swear falsely.

The sufficiency of the indictment was challenged both by motion to quash and by demurrer, both of which were overruled and the validity of the indictment sustained.

It is here claimed that the court erred in sustaining the indictment, the claim being that in order to make the indictment good, as against one who procures another to commit perjury, it must appear from the indictment that the thing sworn to must have been false; that it must have been known to the party

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making the oath that it was false; that it must have been known to the party procuring the swearing to be done that it was false and it must be known to the party procuring the swearing to be done that the party making the oath knew that it was false. It is said that the indictment here, though it does charge that what was sworn to by Duncan was false and that Duncan knew it to be false, that Walker knew it to be false, yet it does not charge that Walker knew that Duncan knew that it was false, the argument being that unless Walker knew that what he was inducing Duncan to do would be perjury on Duncan's part, then there would be no guilt on the part of Walker because Walker did not know that he was inducing Duncan to commit perjury, because there would be no perjury on the part of Duncan if he believed that what he swore to was true, and so if Walker supposed that Duncan supposed that what he said was true, then Walker, though he so induced Duncan to swear to something that was not true did not know that he was inducing Duncan to commit perjury, because he did not know that Duncan did not know it was not true, and our attention is called to the case of *Jehial W. Stewart v. State of Ohio*, 22 Ohio St., 477. The first proposition in the syllabus of that case reads:

“An essential element in the crime of subornation of perjury is the knowledge or belief on the part of the accused, not only that the witness will swear to what is untrue, but also that he will do so corruptly and knowingly.”

The second proposition reads:

“An indictment for subornation of perjury, setting forth in due form of law the crime of willful and corrupt perjury by the suborned witness, and then averring that the defendant feloniously, willfully and corruptly did persuade, procure and suborn the witness to commit ‘said perjury in manner and form aforesaid,’ sufficiently charges the defendant with knowledge that the witness would corruptly and knowingly swear to that which was false.”

In the opinion by Chief Justice Welch, it is said, speaking of the indictment in that case:

“It first charges in due form of law, the crime of willful and corrupt perjury by Saxton, including the averment that Saxton knew his testimony to be false and fictitious, and concluding with the averment that Saxton had ‘in manner aforesaid’ committed willful and corrupt perjury; and it then charges that Stewart ‘procured, persuaded and suborned the witness to commit said willful and corrupt perjury in manner and form aforesaid.’ The natural and primary import of this language is, to charge upon Stewart a knowledge of the guilt and corruption of the witness. The essence of perjury is the knowledge of the witness that what he states is false. To persuade him to commit perjury is to persuade him to stifle his conscience, and to state under oath what he knows not to be true. To persuade him to do less, that is, to make the false statement without the guilty knowledge, is not to persuade him to commit the crime.”

It would appear from this that the proposition is sound, that it must appear from the indictment that the accused knew that if the other party did that which he was persuaded to do by the accused, such other party would thereby commit perjury. But it is said that this indictment charges that the accused “procured, persuaded and suborned the witness to commit said willful and corrupt perjury in the manner and form aforesaid.” Tested by that rule it seems to us that this criticism of the indictment is not well taken. The indictment in the present case sufficiently charges Duncan with knowledge so as to constitute his swearing as perjury on his part. It distinctly charges knowledge on the part of Walker that what Duncan was to swear to was false, and then follows these words:

“And the said Ulysses G. Walker then and there and at all times aforesaid, and on the day and year aforesaid, prior thereto, and at the county aforesaid, did feloniously, willfully, corruptly and unlawfully aid, abet and procure him, the said William G. Duncan in making, verifying and falsely swearing to said report, and the matters and things therein stated as aforesaid, then and there well knowing said report and the matters and things therein stated to be false and untrue, and thereby to commit willful and corrupt perjury in the manner and form as aforesaid.”

We think the allegation in this indictment that Walker knew that what Duncan would swear to was known by Duncan to

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be false is stated more distinctly than in the indictment considered in *Stewart v. State, supra*. The language here is that Walker feloniously, willfully, corruptly and unlawfully did aid, abet and procure Duncan, in making, verifying and falsely swearing to said report. That is, Walker feloniously procured Duncan to swear falsely and thereby to commit willful and corrupt perjury. Certainly, judged by the rule laid down in the *Stewart* case, this knowledge on the part of Walker that Duncan knew that what he swore to was false, is sufficiently stated.

It is however urged that the facts upon which the averment rests that Walker aided, abetted and procured Duncan not being stated, the indictment in that regard is not sufficient. This objection is, as we think by the case of *Stewart v. State, supra*, completely answered, and is so answered by the second paragraph of the syllabus, already quoted.

It will be seen that in that case the averment that the defendant did "persuade, procure and suborn the witness to commit said perjury in manner and form as aforesaid," was held to be sufficient as an indictment. It is true that in that case the question does not seem to have been raised as to whether the specific acts of the defendant, constituting the aiding, abetting and procuring, were necessary to be stated, but as the court held the indictment good and as the charge was practically in the same words as in the indictment now being considered, we should regard it as exceedingly technical, indeed as against the authority of that case, to hold the indictment here bad by reason of the alleged defect now being considered.

Under our statute, Section 7215, which provides that, "No indictment shall be deemed invalid for any defect or imperfection which does not tend to the prejudice of the substantial rights of the defendant upon the merits," we think this indictment clearly sufficient.

Since by our present statute one who aids, abets or procures another to commit a crime is himself a principal offender and may be convicted of the principal offense upon the establishment to a proper degree of certainty that he did either aid, abet or procure another to commit the crime, we find that under the indictment under consideration the state would be permitted to

introduce evidence to establish the aiding, abetting or procuring, and we do not find that one might not be found guilty of aiding and abetting the offense of perjury without being personally present when such perjury was committed.

In the case of *Chidester v. State*, 25 Ohio St., 435, the statute under consideration made the procuring of a crime to be committed a separate crime from the principal offense, and so differed from the present statute in that regard, and under the statute as it then was, it was held, that one under indictment for forgery could not be convicted of that offense without being personally present when the forgery was committed. It by no means follows from this that if he had been indicted for procuring the defendant, or abetting the forging of the instrument, it would have been necessary that he be present. Indeed, the language of the court clearly indicates that such would not be the case. This is said in this connection because the brief of counsel for plaintiff in error urges that under the evidence in this case, it being clearly made to appear that Walker was not personally present when the alleged perjury is claimed to have been committed, he could not be found guilty of aiding or abetting the perjury but only of procuring the perjury to be committed, if he could be convicted of anything, and so, it is urged, that under the facts of the case, the defendant was not properly convicted under the evidence, because it does not appear that Duncan would not have done what he did without any suggestion or procurement on the part of Walker. And attention is called to the definition of the word "procure" and quotation is made from page 697 of the 22d American & English Encyclopedia of Law, 2d Edition, of these words:

"Subornation of perjury is procuring a person to commit perjury which he actually does in consequence of such procurement."

Section 1197 of Bishop's Criminal Law is called to our attention, where it is said in the brief of counsel, this language is used, in speaking of perjury, that such perjury was committed "in consequence of the persuasion." We have carefully examined the section in the 8th Edition of this work, published

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in 1892, and fail to find the language quoted. In support of the text several cases are cited, and we are not prepared to say that the proposition is not true and that one can only be convicted of procuring another to commit this crime when such other does commit it in consequence of such procurement. But further, we are not prepared to say that the jury might not, under the evidence in this case, have properly found that whatever was done by Duncan in the matter under consideration, was done in consequence of the procurement by Walker or the inducements held out to him by Walker.

On the 2d of December, 1908, Walker was president of a banking corporation known as the South Cleveland Banking Company. Duncan was the treasurer of the same corporation. Under the laws of the state, the officers of this corporation were required to make a written report, under oath, from time to time, to the superintendent of banks of the state. At the date last aforesaid a report was made out on printed forms furnished by the said superintendent upon which blanks were left to be filled out in writing. On what is known as the front page of that report, one of the things required to be reported was "overdraft." The amount filled out as against this item by Walker was in figures \$567.71. This was not a true statement of the condition of the bank as to "overdrafts," unless more than \$300,000 which was owing to the bank by the Werner Company of Akron, was properly treated as a loan and not as an overdraft. This was carried on the books of the company as an overdraft. It grew out of transactions between this bank and the Werner Company, involving more than a million dollars, which last named amount was owing by the Werner Company to the banking company at the time this report was made out. The banking company at this time held bonds of the Werner Company to a large amount, which represented a part of this indebtedness or in any event which were held by the bank because of this indebtedness.

The claim is made on the part of Walker that the bank was not the owner of the bonds last spoken of, but held them only as security for the payment of this indebtedness, which has been mentioned in this opinion as more than \$300,000, and that this

sum was a loan to the Werner Company; that the bank did not own the bonds, and that therefore the bonds were not included as such in this report, but that this amount was included in what was reported under the heading of "Loans and Discounts." The evidence establishes that at one time the bank held the notes of the Werner Company for this amount; that it gave up these notes, endorsed them as canceled and paid and accepted these bonds, and we think from the evidence it is perfectly clear that either these bonds were the property of the bank and should have been included as such, or they were held as security for an overdraft to this amount. Walker says that he did not report to the directors of the bank the true situation of this indebtedness because he feared to do it. All that is said by Walker about it in his testimony shows that both he and Duncan were purposely deceiving the directors of the bank with reference to this debt, and that it was intended to deceive the superintendent of banks, and from Walker's testimony we think the jury were warranted, in finding that this indebtedness to the bank should have been reported as an overdraft. It was in fact such, and it was so carried on the books of the Werner Company. It was by Walker and Duncan intended that the directors should understand it to be other than what they knew it to be, and for this purpose a report was made out as it was, making this very serious false statement. After Duncan had made out the report as herein indicated, he signed his name to an affidavit, printed at the foot of the report, which reads:

"I, W. G. Duncan, Treas. of the South Cleveland Banking Company, do solemnly swear that the above statement is true, and that the schedules on the back hereof fully and correctly represent the matters therein to be covered to the best of my knowledge and belief."

To this there follows the following:

"The State of Ohio, County of Cuyahoga. Sworn to and subscribed before me this 2nd day of Dec., 1908.

"G. W. GILL,
"Notary Public."

The notarial seal of the notary is affixed.

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On the back of this report blanks were filled out by Walker, undertaking to give the situation of the bank as to loans and discounts. This was equally false in that it reported the amount of bonds of the Werner Company held by the bank as \$10,000, omitting entirely the \$300,000 worth of bonds which have been spoken of, and which were, as already stated, either the property of the bank or held as security for the overdraft already mentioned. Walker says that this placed upon the back was put upon it by him after the portion written by Duncan was put on, and after the affidavit was signed by Duncan. He says also that he saw this was so signed by Duncan; that it was laid by Duncan on his desk, and that he expected him to swear to it.

It is urged that this, with all other evidence put together, fails to show that Walker procured Duncan to swear to this report. He directed Duncan to make the report, knowing that he was to swear to it. When he gave that direction it is perfectly clear that both he and Duncan understood that it was to be a false report in the particulars already pointed out. Duncan was an officer subordinate to Walker, and knew that if he followed the direction of Walker, as expressed or necessarily implied, he must make out and swear to a false report. If it was false, as we find it to be, Duncan knew that it was false; Walker knew that it was false; and Walker knew that Duncan knew exactly what the situation was, and even if the jury were to have found that Duncan did not make and subscribe this report because of the procurement of Walker, they surely would have been justified in finding that Walker aided and abetted in having it done—in having all done by Duncan that was done by him.

But it is said that the evidence is not sufficient to show that this report was sworn to by Duncan. Duncan says it was; Gill the notary says that it was. The presumption is that it was, because the notary so certifies. It is true that on cross-examination neither Duncan nor Gill show that they remember exactly what was said, but they show, as we think, enough to warrant the jury in finding that it was sworn to. No particular form of words is necessary to the taking of an oath. Witnesses in open court who are sworn to testify in trials seldom say any-

thing, but the clerk of the court administers to them an oath, to which afterwards on their part they are held to have assented, and if having gone through with this ceremony they wilfully testify to what is false, they have committed perjury, although no word was used by them in the taking of an oath.

After the argument of the case counsel for the defendant below made a large number of requests, which the court was asked to give in charge to the jury. The language introducing these requests reads:

“Thereupon the defendant requested the court to charge the following propositions separately and not as a series.”

Then follow thirty-seven propositions so requested to be charged. Among them is No. 34. It will be seen that by the language used in introducing these requests they were to be charged separately and not as a series. This did not require of the court to pick out parts of any one of these requests and give them to the jury, unless the court found that that entire request should be given. It simply called upon the court to say whether any one or more of these thirty-seven requests should be given as a whole. This thirty-fourth request included among other things, the following: “You must assume that Duncan, when he testified, did hope that by testifying as he did he would escape prosecution and conviction.” Immediately following that and as a part of the same request, is this language: “If you find that when Duncan appeared before Gill on December 2, 1908, he said to Gill, I want to swear to this statement, and that all that Gill said was, “Is this true, Will?” and that no other ceremony was performed, I charge you that that did not constitute the administration of a legal oath, and that you must return a verdict of not guilty.”

Now whatever may be said as to the last sentence read, the court was clearly justified in declining to give the thirty-fourth request, because of the language contained in the request as hereinbefore quoted, to-wit, “You must assume that Duncan when he testified did hope that by testifying as he did he would escape prosecution and conviction.” There was no error in refusing to give this thirty-fourth request as a whole.

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Attention is called to this language because it was especially urged upon the court in argument. What the court said to the jury in reference to the administration of an oath sufficiently instructed the jury as to what it was necessary for the state to prove in that regard. And as to each of the other requests, so far as they state the law applicable to the case, they were properly charged in the instruction given. There was no error in the charge of the court, nor was there any error in refusing to give the several requests.

It is further urged that there was error on the part of the court in its ruling on the admission of evidence, in this:

“When Walker was upon the stand he was asked in cross-examination by counsel for the state, if the bank did not have about eight thousand depositors. This question was objected to, the objection overruled, and an exception taken on the part of Walker. Walker then answered: ‘There were between six and seven thousand as I remember.’”

We find no error in this ruling. It had developed in the evidence before this that the bank was insolvent; that it had on deposit two million dollars; that considerable more than half of this amount was loaned to the Werner Company; that the Werner Company was in the hands of a receiver, because of its insolvency, and that it, as a customer of the bank, had been permitted to overdraw to the amount of more than \$350,000: that of the overdrafts carried by the bank at the time this report was made out, other than the overdraft of the Werner Company, was about \$576.73. The state had a right in the cross-examination of Walker to search his conduct in this matter and to have it appear to the jury that the treatment of the Werner Company, of which Walker was a salaried officer, was so stupendously different from its treatment of every other depositor, and to emphasize this, that there were thousands of depositors who, altogether, had been permitted to overdraw only to this trifling amount, while this one customer was permitted to overdraw the enormous amount which it had overdrawn.

Complaint is further made that the court erred in overruling the motion for a new trial because of the language used on the part of each of the counsel for the state in his argument to the

jury. Among the things counsel for the state in argument said (speaking of Walker) is: -

“He is an American and entitled to your consideration; entitled to justice; entitled to no more because he sits on that side of the table; no more than if he were among the seven or eight thousand depositors who seem to sympathize in this prosecution with this side of the table; whose all has been swept away, we contend, by his misconduct.”

It is said that this language was calculated to inflame the prejudices of the jury without being based upon any legitimate evidence. We have already said that the evidence given by Walker, upon cross-examination, that there were between six and seven thousand depositors was legitimate. The counsel in the heat of the argument used the words seven or eight thousand instead of six or seven thousand, but it can not be supposed that this difference in the number of depositors could have had any effect upon the jury. Whatever was to be drawn from the number, and whether it was six thousand or eight thousand, was immaterial. But it is said, that there is no evidence that the “all” of these depositors had been swept away by the misconduct of Walker, and through the mismanagement of this bank. As has already been said, it was shown by the evidence that these depositors had put more than two millions of dollars into this bank, and that more than one-half of it had been loaned, in violation of law, to one concern, which was shown to be insolvent, and was no such exaggeration of facts as would justify the court in holding that the language used constituted misconduct on the part of counsel to say that the “all” of these depositors had been swept away. Suppose, instead, he had said, Walker is entitled to no consideration greater than the thousands of depositors whose means to the amount of more than a million of dollars have been swept away, or whose means to the extent of more than a million of dollars have been loaned to an insolvent corporation, of which Walker was an officer; and this language would have been justified by the evidence.

Counsel for the state also said: “Every dollar of the money that he put into that company came out of the pockets of the

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depositors of the South Cleveland Banking Company; not a dollar of his own money went into it." We think, notwithstanding that which Walker says as to the amount that he contributed to the capital stock of the Werner Company, that when the counsel was speaking of the money which was owing by the Werner Company to the banking company, he may well be excused for using the language which he did.

Some of the language used by the assistant prosecutor is rather picturesque, but did not constitute misconduct. In speaking of some one other than Walker, probably of Mr. Werner, who was a witness, he said:

"As soon as you drag down Captain Wagner's bank, the Akron Savings Company, you had to seek, like a vampire for new blood and new victims, and you lit upon the bank of Newberg; that is the bank that your vampire's tentacles clinched upon; that is the one that this blood sucking mouth ran into."

As already said, this language is somewhat picturesque, but it did not constitute misconduct, under the evidence. A concern which had borrowed money from one bank to a large amount and that bank had gone to the wall, and then continuously for a period of years drawn from this South Cleveland Bank to the amount of more than a million dollars, without any adequate authority, might very well justify the characterization of it as a vampire which was sucking the blood from the bank.

Complaint is made that the prosecuting attorney used this language: "Aye! There are thousands of people walking the floor now because of what Walker did. If Walker had done right and made that report right, that bank would still live and those thousands of depositors would have been saved."

To properly understand this language, it must be considered with its context. The entire sentence used by the prosecutor was as follows: "He forgot about the other side when he told how Walker walked the floor at night in wee small hours, and worried about that bank," and then follow the words complained of. There appears to have been no suggestion made when this language was used that counsel for the other side had not spoken

of Walker's walking the floor at night because of the suffering he was undergoing on account of the affairs of the bank, and yet no evidence was introduced nor would it have been admissible to introduce it, to show any such walking or suffering on the part of Walker. But it having been said by counsel for Walker, as we have a right to assume it was said, because no complaint was made of the statement of the prosecuting attorney that it was said, the latter might well be excused for using the language used by him to counter-act the feeling of sympathy for Walker which the language used by his counsel was calculated to affect.

Without selecting further language used by counsel in the argument it must suffice to say, that after reading the arguments of both of the attorneys who represented the state, we find no serious misconduct; certainly no misconduct that would justify a reversal of the case, and painful as the duty is to contribute in any degree to the imprisonment of a fellow-citizen and especially of one who has had the respect of the community in which he lives, we feel constrained to perform that painful duty as the judge of the court below and the jury below felt called upon under their oaths to perform it, and the judgment of conviction is affirmed.

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LIEN FOR WORK MADE NECESSARY BY MISTAKE OF ARCHITECT.

Circuit Court of Cuyahoga County.

JOSEPH GROSS V. FRANK LUKAS.

Decided, June 7, 1910.

Mechanic's Lien—Extra Work Ordered by Architect.

Where extra work on a house, made necessary by a mistake of the architect, is ordered by him under an arrangement with the owner that the architect would pay for it, the contractor who does the extra work may have a lien therefor upon the interest of the owner in the premises, notwithstanding he has knowledge of the arrangement between the architect and the owner that the former would pay the bill.

Hidy, Klein & Harris, for plaintiff in error.*Benjamin Parmely, Jr.*, contra.

MARVIN, J.; WINCH, J., and HENRY, J., concur.

Suit was brought by Lukas against Gross upon an attested account and to foreclose a mechanic's lien. The facts are that Gross engaged a contractor to build a house for him; the work of building said house was to be under the supervision of an architect named. By error on the part of the architect a mistake was made in building a bay window on the side of the house which brought it so near to the adjoining lot line as to be obnoxious to the building code of the city of Cleveland, in which city this building was being erected. The attention of the architect, the builder and the owner being called to this by the city authorities, the architect agreed at his own expense to remove this bay window, and build one at another place on the house, which would not be in violation of the building code. This change was made, but unhappily the architect did not pay for it. The contractor was put to the expense of this change, and for the labor and material upon it he made out an account and perfected a lien upon the premises, if he was entitled to any lien.

The claim made here is that Gross the owner was under no obligation to pay the contractor; that he (the contractor) was bound to look to the architect. It is urged first on behalf of the plaintiff in error that the allegation of the petition that the work was done and the material furnished at the request of the agent and architect of the owner does not make such an averment such as entitled the plaintiff to take out a lien, the language of the statute being that such lien can be taken out when the work or material are furnished "by virtue of a contract, express or implied, with the owner, or the authorized agent of the owner." The petition here alleges that Harry Cohen was the agent and architect for the owner and seems to us clearly to bring the case within the statute and makes the petition good. The allegation being that the work was done and material furnished "at the request of the agent" is a sufficient allegation that through this agent the owner made an implied promise to pay for this work and material. The arrangement between the owner and the architect that the architect would pay for the work was not binding upon the contractor, even though he knew of that arrangement. He had a right, as we think, to do this work, and furnish this material for the alteration in this house, by the direction of the architect, with the implied promise on the part of the owner that he would pay for it, even though he (the contractor) knew that this extra expense had been caused by the negligence of the architect and that he had agreed to pay for it.

We think that the result reached in the court of common pleas is right, and the judgment of the court is affirmed.

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CORPORATION BOUND BY CONTRACT MADE BY SECRETARY.

Circuit Court of Cuyahoga County.

THE GRABLER MANUFACTURING CO. v. T. J. LEAHY.*

Decided, June 7, 1910.

Corporations—Contracts—Knowledge and Approval of President.

Where a by-law of a corporation provides that its contracts can be made only by its president, a contract made by its secretary, of which the president had knowledge and approved, is binding upon the corporation.

Weed, Miller & Rothenberg, for plaintiff in error.*Tanney & Barber*, contra.

MARVIN, J.; WINCH, J., and HENRY, J., concur.

Leahy brought suit against the Grabler Manufacturing Company to recover for money which he claimed to be due upon a contract entered into between himself and the company. The whole question involved here is whether there was a contract between the parties. A writing was made out which, if it is a contract binding upon the company, entitled the plaintiff below to the recovery which he had. This writing, which is in the form of a contract, is signed with the name of "The Grabler Manufacturing Company, William S. Bayer, Sec."

It is conceded that Bayer was the secretary of the company at the date of this writing, and that his name appearing upon the writing, as above stated, was written by him. It is conceded that the secretary was not authorized by the board of directors of the corporation to make this contract, and that a by-law of the board provides that contracts can be made only by the president of the board. But the defendant in error says that though the secretary was not authorized on behalf of the company to bind it by this contract, its conduct in relation to the writing after it was executed was a ratification on the part of the corporation of the contract.

*Affirmed without opinion, *Grabler Manufacturing Co. v. Leahy*, 85 Ohio State, 442.

In its charge to the jury the court told them that the secretary had no authority to make this contract, but, he said:

“It is admitted, gentlemen of the jury, in the case, that the president of the defendant corporation, Mr. Rosenfeld, had the power and the authority to make the contract or make such a contract as was made in this case, and the only issue here is whether or not he did make it. If he approved of a contract made by the secretary of that corporation, then that act of approval on his part would find it. No claim is made here that Mr. Rosenfeld, as president, signed the corporate name of the company to this contract, but the claim is made here that, having the power to approve of the contract, the evidence shows that his contract and acts were such as to warrant the belief that he did approve, that he did know of a contract which had been signed by the secretary and that, as a matter of fact, he did approve it.”

Certain propositions were asked by the defendant below to be given to the jury. These were not given except in so far as they are given in the general charge. Without stopping to read them, we think the propositions were sufficiently well covered by the charge as given. The only serious doubt that we have in the matter is whether the court was sufficiently specific in instructing the jury that to make the conduct of the president a ratification of the contract it must be shown that the president at the time of such ratification, had knowledge of the contract. But on the whole we are of opinion that the language used, which has already been quoted, would be understood by the jury to require a knowledge on the part of the president, before his conduct in relation to the contract could constitute a ratification, and so finding we reach the conclusion that there is no error apparent on the record and the judgment of the court of common pleas is affirmed.

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LIABILITY OF OWNER OF TEAM CAUSING DEATH OF CHILD.

Circuit Court of Cuyahoga County.

**WILLIAM BECKER v. JENNIE HOWANYECZ, ADMINISTRATRIX OF
THE ESTATE OF BERNARD HOWANYECZ, DECEASED.**

Decided, June 28, 1910.

*Wrongful Death—Driver of Team Agent of Owner—Infant—Excessive
Verdict.*

1. In an action against the owner of a wagon for death from wrongful act occurring through the negligence of a driver of the wagon in running over an infant playing in the street, the fact that the driver was in charge of and driving the team attached to the wagon sufficiently established his agency so as to charge the owner thereof with liability.
2. A verdict of \$800 for the death of an infant two years old will not be set aside as excessive, even though there was no evidence introduced as to the probable length of life of the infant or as to what it would probably have contributed to the support of the beneficiaries of the judgment, if it had lived.

*Higley, Maurer & Dautel and P. L. A. Lieghley, for plaintiff
in error.*

Joseph L. Stern, contra.

MARVIN, J.; WINCH, J., and HENRY, J., concur.

The parties here stand in the reverse order to that in which they stood in the action in the court of common pleas. The terms plaintiff and defendant as used in this opinion will refer to the parties as they stood in the original action.

The plaintiff is the administrator of the estate of a deceased infant of about two years of age. The defendant is the owner of several large wagons, with teams, used for moving furniture and the like.

On the 17th day of October, 1907, the child whose estate is being administered upon by the plaintiff, was killed on West 19th street in the city of Cleveland. The claim on the part of the plaintiff is that the child ran out into the street, got in front of a team of the defendant, driven along said street in connec-

tion with one of the large moving wagons, and was knocked down by one of the defendant's horses in said team, and stepped upon by one of the defendant's horses and killed; that the driver of the team was the agent of the defendant, and that he was negligent in that he did not keep a lookout in front of his team to see what might get in front of it, and this on a street where a good many children were accustomed to play. That the child was killed either by one of the horses in the team or by the wagon running over it, is not denied.

The evidence discloses that the team was being driven at a slow trot or jog. The driver himself testifies that some dogs on the ground were barking at a dog in the wagon of the defendant. The testimony of Mary Moran is that she being at a house adjoining the one in which the child lived, saw the child go out into the street; saw the feet of one of the horses strike the child; and saw the child fall and the horse step upon the child's head. The driver of the team did not notice the child and drove on, but immediately following him was another team belonging to the defendant, the driver of which saw this accident. He stopped his team, picked up the dead child and delivered it to its mother, who had rushed out hearing the screams of Miss Moran, who testifies to having seen the accident. This driver of the second team says that the child ran under the wagon of the first team and not in front of the horses. Miss Moran testifies that the driver of the first team was striking his whip at the dogs which were barking on the ground, and also was not looking in such wise as to see what was in front of his team. This the driver of the first team denies. The driver of the second team does not know whether the driver of the first team was looking in such wise as to see what was in front of his horses or not, but does know he was giving some attention at least to the dog in the wagon. The testimony of Miss Moran directly conflicts with the testimony of the driver of the front or first team, but we find nothing improbable in her testimony, and are not surprised that the jury should have believed her testimony to be true. The jury was properly instructed as to what would constitute actionable negligence, and if they believed Miss Moran, as they might well do, they properly found

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that there was negligence on the part of this driver, who should have been looking out when his team was being driven along a street in a populous city, where children play in the street, to see what was in front of his team. He says he was. She says he was not. The jury believed her.

The brief of the defendant urges that the driver of the team which killed the child, either by being trodden upon by one of the horses, or by being crushed by the wagon, is not shown to be the agent of the defendant. It is shown by his testimony and by that of the other driver, that he was in charge of and driving the team of the defendant and this sufficiently establishes his agency, and so far for his negligence in the performance of his duty as driver of that team is concerned, the defendant would be liable. The result in the court below was a verdict for \$800 in favor of the plaintiff. No evidence was introduced as to the health of this child, or circumstances of the family of the child, except that the child had a mother and a young brother and sister. It is said on the part of the defendant that the damages, if any were to be recovered, were excessive, and that, indeed, without evidence as to the probable length of life of the child, and the probable aid that it would be to the family, nothing more than nominal damages should have been recovered in any event, and that surely the verdict for \$800 is excessive.

In the case of *Russel v. Sunbury*, 37 Ohio St., 372, the court on page 376 in the opinion uses this language:

“The law assumes that there is such a pecuniary loss to the widow and next of kin, and awards to them damages therefor.”

In the case of *Transit Company v. Dagenbach*, 11 Ohio Circuit Decisions, 308, a recovery for \$1,000 was sustained for the death of a boy five years of age, although no evidence was permitted to go to the jury as to what the boy might probably have been able to earn in aiding his father in his cigar factory. At page 310 of the opinion, Judge Laubie, speaking for the court, says that the father was a cigar maker and offered to show that he expected to use the boy to aid him in his work as such. This evidence was excluded, and though it might properly have been admitted, still in the absence of any evidence, as already stated,

the court permitted the judgment to stand. The concluding paragraph of the opinion reads:

“While we might have been better satisfied with a less verdict, we are not prepared to say that it was a verdict that was rendered under prejudice or passion, or that it was clearly excessive within the meaning of the law, which allows the party to take advantage of such a question. We can not say that this verdict was manifestly wrong, and on the whole the case will have to be affirmed.”

This judgment was affirmed, without report, by the Supreme Court. See 67 Ohio St., 612.

In the case of *Ellis v. Twiggs*, decided by this court on the 13th of January, 1910, which was a suit for the wrongful death of a wife, Judge Henry said, speaking for the court:

“As to the measure of damages it is claimed that nothing is shown in the evidence regarding any actual pecuniary damages sustained by any of the next of kin, the husband and children of the deceased. We think it is unnecessary to show anything more than the fact of wifehood and motherhood to authorize substantial as distinguished from nominal damages.”

See, also, *Railway Co. v. Murphy*, 50 Ohio St., 135.

This was an action for wrongful death and in that case it was urged that nothing was shown affirmatively as to the pecuniary loss to the beneficiaries. The court, however, sustained a verdict for the plaintiff.

We reach the conclusion that the court did not err in overruling the motion for a new trial on the ground that the verdict was not sustained by sufficient evidence, nor on the ground that the verdict was excessive. It is said, and properly too, that juries are not permitted to “guess” what the damages in this or in any other case will be, and this is correct, if the word “guess” is construed to mean “to reach a conclusion without any basis for it.” But the word may be used in such sense as to be misleading, because in all cases where a recovery is had for wrongful death, the damages are altogether uncertain. It can never be known how long the deceased would have lived but for the accident, nor what he or she would have contributed

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to the support of his or her family or next of kin. It can only be determined on probabilities.

The language quoted from the opinion of Judge Laubie in *Transit Co. v. Dagenbach, supra*, expresses our views in reference to this case, and the judgment is affirmed.

FRAUD IN THE SALE OF REAL ESTATE.

Circuit Court of Cuyahoga County.

W. SCOTT RADER V. MARY BASCH.

Decided, June 28, 1910.

Charge as to Proof of Admitted Fact—Action for Fraud Against Agent—Claim Against Principal Not Paid—Note Enforceable Though Mortgage Not.

1. It is not error to refuse to charge that the plaintiff can not recover unless she prove a fact which is admitted in the answer.
2. One who has been defrauded by the misrepresentations of an agent of an owner of property sold to her as to the incumbrances thereon, may maintain her action against such agent for the fraud, notwithstanding she has proved up her claim against the principal upon such principal's adjudication in bankruptcy, but has realized nothing from the bankrupt's estate.
3. One who by fraud has been induced to give a note and mortgage on her property to an innocent third person, may recover from the person who so fraudulently induced her to give the note and mortgage, the amount thereof, notwithstanding the mortgage securing the note is defectively executed and unenforceably, she being required, however, to pay the note.

Carl Thompson and Frank C. Scott, for plaintiff in error.
F. F. Klingman, contra.

MARVIN, J.; WINCH, J., and HENRY, J., concur.

The relation of the parties to each other here is the reverse of their relation in the court of common pleas. The terms plaintiff and defendant as used in this opinion, refer to the parties as they stood in the original case.

Plaintiff brought her action in the court of common pleas seeking to recover from the defendant the sum of \$1,800 for damages which she claimed to have sustained by reason of the breach of a contract entered into between herself and the defendant on the 24th of April, 1895. She prayed to recover a judgment for \$1,800 and interest. The jury returned a verdict in favor of the plaintiff for \$2,268.

A motion for a new trial was made and the court, as a condition for overruling the motion, required that the plaintiff remit from such verdict the sum of \$490. This the plaintiff did, and the judgment was thereupon entered for the amount of such verdict, less said \$490, to-wit, the sum of \$1,778.

The facts are these:

The defendant was acting as the agent of one J. W. Hamby, who was a dealer in real estate in this city. He agreed with the plaintiff to sell her a certain piece of real estate in the village of Lakewood in Cuyahoga county, Ohio, for the sum of \$2,750, and to give her a free and unincumbered title to said property. The defendant disclosed the fact to the plaintiff that he was the agent of Hamby and she dealt with him with that understanding. The price of \$2,750 was made up by her paying to him \$1,150 in cash, or rather in a certified check, which was received as cash, and giving a note for \$1,600 secured by mortgage upon the property. This note and mortgage were turned over by Hamby to one Shepherd, who furnished the \$1,600. The mortgage was defective in that it was not acknowledged before any officer, and there was but one subscribing witness. The note, however, was valid. As a matter of fact, at the time the deed from Hamby was delivered to the plaintiff by the defendant, there was a mortgage upon the property for \$1,800 owned by the Union Savings & Loan Co. As already stated, the title which the defendant agreed to give to the plaintiff was to be free and unincumbered. Some two years elapsed after the transaction already named before the plaintiff discovered that this mortgage of \$1,800 was outstanding on the property. Meanwhile she had paid some \$800 to Shepherd on the \$1,600 note, and in the interim Hamby had disappeared, but he had reduced the mortgage for \$1,800 as is said by the defendant in

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his answer, to about \$1,650, so that the real incumbrance on the property was the last named amount when the deed was delivered to the plaintiff. This sum, with the interest upon it, making an aggregate of some \$1,662, the plaintiff paid in order to relieve her property from the encumbrance wrongfully left upon it by Hamby. In order to do this, she was obliged to borrow about \$1,600, \$1,200 of which she borrowed of Shepherd, the man who had furnished the \$1,600 at the time of the purchase, and whose note had been reduced at this time to about \$800. To accomplish this, the original \$1,600 defective mortgage was canceled and the \$800 remaining unpaid upon the original loan from Shepherd was merged with the \$1,200 which Shepherd now furnished, and the plaintiff gave her note and mortgage to Shepherd for \$2,000, borrowing from a relative something like \$400, which last named sum, together with the \$1,200 new money obtained from Shepherd and some little money which the plaintiff had, was sufficient and was used to pay off the balance still due on the Union Savings & Loan Company's mortgage. The damage, therefore, which the defendant suffered at the hands of Hamby, and for which the defendant is liable, if he is liable at all, is this \$1,662, which she was required to pay to relieve the property from the last named mortgage.

It is urged as against this that since the original mortgage given to Shepherd was invalid for want of acknowledgment and for want of proper witnesses, she did not suffer this entire amount, because, it is said, her mortgage to Shepherd being invalid she need not have paid that sum to him. This ignores entirely the fact that she got \$1,600 from Shepherd for which she gave her note, and which, because she gave her note, she was bound to pay whether she gave any mortgage for it or not. It is not to be presumed that the plaintiff could by some dishonest means have defeated Shepherd from collecting the \$1,600 which he had furnished the plaintiff for the purchase of this property, and for which she had given her note, and half of which she had paid before she discovered the fraud. And what is here said disposes of one of the grounds of error claimed in the refusal of the court to charge as to the invalidity of this

original Shepherd mortgage. So that the whole question is as to whether the defendant was responsible for this defect in title, and this depends upon a question of fact whether he, at the time he delivered the deed, told the plaintiff that the property was then free and clear of encumbrance. He says he did not, but that he assured her that the \$1,800 mortgage would be at once discharged and canceled, and that he made this assurance upon the assurance of Hamby that the \$1,600 which was to come from Shepherd and a sufficient part of the \$1,150 paid in cash, would be used for that purpose. Hamby failed to do this.

The plaintiff, her husband and daughter, all testify that when the deed was delivered by the defendant to the plaintiff he stated that, to use his own terms, this Union Savings & Loan Company mortgage was "raised and canceled." And these witnesses also testify that he then produced an abstract of title on which this mortgage was shown, and shown to be canceled, using the language, "You asked me for an abstract for 60 years, here is one for a hundred years; what more do you want?"

That the abstract shown had been in the possession of the Union Savings & Loan Co. is certain; that this abstract was taken from such company by Hamby is also certain. This abstract has disappeared; nobody is able to find it or produce it; it was not returned to the Union Savings & Loan Company. Hamby may have forged a cancellation upon it. The defendant testifies, however, that when this abstract was shown to the plaintiff it did not show a cancellation of this last named mortgage, and as has already been said, he denied that he made the statement that it had been discharged, and that he knew at the time the deed was delivered that the loan company's mortgage was still outstanding, but he expected it would be at once discharged by Hamby, and that he stated those facts to the plaintiff.

If the jury believed him the verdict should have been for the defendant. Manifestly the jury did not believe him, but believed the plaintiff and her witnesses, and probably made the excuse for the defendant that when he made the statement that this mortgage had been "raised and canceled" he believed that no harm could come from it, because he expected it would be

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at once done. Yet giving this excuse, it does not relieve him from liability in this action. He was liable if he made the misrepresentation which the plaintiff and her witnesses say he did make, knowing that it was not true.

The testimony shows that the bargaining for this property was conducted by the plaintiff and her husband; that the deed was first made out to the husband, but at his direction a new deed was made out to the wife. The husband testifies that he paid the money to the loan company for the cancellation of its mortgage, and, it is urged, that this being true the plaintiff can not recover in this action. The evidence, however, shows that the money to the extent of \$1,200 was raised by mortgage upon this very property, and that the \$400 was borrowed from a sister of the plaintiff. The fact that the money was actually handed over by the husband does not take away the right of the plaintiff to recover, when the mutual interest of the husband and wife in this property, and the way in which it was purchased, are considered. This payment was not a voluntary payment on the part of the husband in such sense as it would be if some outsider, who had no interest in the property, had made the payment.

The defendant requested the court to charge, before argument, among other things, the following:

“Before there can be any recovery in this case, the plaintiff must prove that the amount she paid to the Union Savings & Loan Company, if she paid anything whatever to it to satisfy its mortgage on her property, was actually due and owing on such mortgage, and in the absence of such proof, your verdict must be for the defendant in this case.”

This was refused, and it was properly refused under the pleadings in the case, for the answer admits that there was such a mortgage to the amount of \$1,800, and that payments had been made upon it, reducing it to \$1,650. With that answer on file by the defendant it would have been clearly erroneous for the court to charge as requested.

The court was also asked to charge that “the plaintiff, if she sustained any loss by reason of the mortgage to the Union Savings & Loan Company on the property purchased by her, might

recover such loss from J. W. Hamby, who delivered his deed to her to such property, warranting the title free of incumbrance. If you find, therefore, that she has elected to rely on such warranty and to look to J. W. Hamby or his estate for her loss, she can not recover such loss from defendant in this case."

The only possible ground on which any claim could be made that this charge should go to the jury is the evidence that Hamby went into bankruptcy and that the plaintiff proved up her claim in the bankruptcy proceeding, and got nothing from it. Clearly it would have been erroneous to have given this charge. The plaintiff might well prove up her claim against Hamby and get all she could from his estate, and hold the defendant if she could hold him at all, for the balance. She did prove up her claim against Hamby. She got nothing. This certainly did not relieve the defendant.

A request was made that the court charge that if the mortgage to Shepherd was not acknowledged before a notary public or some other officer authorized by law to take acknowledgments, and that if Mary Basch never did acknowledge the mortgage before a notary who certified to such acknowledgment that such mortgage was null and void. This request was properly refused, because as has already been said in this opinion, the validity of this mortgage to Shepherd was a matter of indifference so far as the liability of this defendant is concerned. The plaintiff raised the \$1,600 and it was paid to Hamby. She gave her note which she was bound to pay. It was a matter of indifference to Hamby or the defendant, so far as their liability to the plaintiff is concerned, whether the security which she gave for the payment of such note was valid or invalid.

This disposes of the requests to charge, and they have been treated here as though they were requests properly proffered before argument, although the language of the bill does not show that they were proffered in the manner pointed out by the statute, the language of the bill being: "Whereupon counsel for the defendant requested the court give the following charges to the jury before argument," whereas the statute provides that they shall be presented in writing. However, as already stated, no part of the finding of this court is based upon this failure to properly request charges before argument.

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The result is that an examination of the entire record fails to show any error for which the judgment should be reversed and it is therefore affirmed.

DEFECT IN BOWLING ALLEY CAUSES INJURY TO PLAYER.

Circuit Court of Cuyahoga County.

THE HUMPHREY COMPANY v. FREDERICK OHLSON.

Decided, June 28, 1910.

Negligence—Defect in Bowling Alley—Duty of Proprietor to Inspect.

The proprietor of a bowling alley impliedly warrants that it is safe for the purpose intended, and is therefore under a continuing duty of inspection to see that it is safe, and if he neglects this duty the question of his knowledge or ignorance of a defect which renders it unsafe is immaterial.

*Smith, Taft & Arter, for plaintiff.**Fred. Desberg, contra.*

MARVIN, J.; WINCH, J., and HENRY, J., concur.

The relation of the parties to each other here is the reverse of their relation in the court of common pleas. The terms plaintiff and defendant, as used in this opinion, refer to the parties as they stood in the original action.

The facts are that the defendant is a corporation conducting a place of amusement near the city of Cleveland, known as Euclid Beach Park; that the diversions offered to patrons thereof is that of bowling on a ten pin alley; that on the evening of September 16, 1907, the plaintiff, with his wife and other friends, were at said Euclid Beach Park and having paid for the privilege of doing so, were engaged in bowling at this alley; that when the plaintiff ran forward with a ball to bowl, the heel of his shoe caught on a nail; he was thrown down and his arm broken. His suit was brought to recover damages for this injury. A verdict for \$500 was rendered in his favor and judgment was entered

upon that verdict, to reverse which judgment the present proceeding is prosecuted.

It is urged that there was error to the prejudice of the defendant in the trial for which this judgment should be reversed.

First, it is urged that the court erred as shown on page 130 of the bill of exceptions, in excluding evidence offered by plaintiff in error.

D. S. Humphrey, the president of the defendant corporation, was upon the stand and was asked this question:

“Q. Can you tell us, Mr. Humphrey, how many square feet of floor space there are at Euclid Beach Park?”

An objection to this on the part of the plaintiff was sustained by the court. The answer would have been “I can.”

Then this question was asked of the witness:

“Q. Will you state to the court and the jury how many square feet of floor space over which people walk, you have at Euclid Beach Park?”

Objection to this, made by the plaintiff, was sustained by the court. The answer would have been, “four hundred thousand square feet.”

The only possible bearing that these answers could have had, or could be claimed to have had, upon the issues in this case, would be upon the ground that because of their immense amount of floor space which the defendant had for the use of its patrons, less care would be required from it with respect to any one particular part of such floor space. This seems to us to be entirely untenable. A certain degree of care was required on the part of the defendant at its park, and that same degree of care was required at each particular part of the park to which its patrons were invited, and for which they paid, whether the park was large or small, or whether the floor space was great or limited. There was no error in this ruling of the court.

The only other claim of error in this ruling by the court is; that under the evidence the jury should have returned a verdict for the defendant, and that having returned a verdict the other way, the court should, on motion for a new trial, have sustained such motion; there was a motion for a new trial on this ground.

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It is urged that what is properly called the "runway," being the floor space over which the bowlers run before delivering the ball, was floored exactly as the alley itself was floored; that indeed it was but a continuation of the floor of the alley; that this was of hard polished planking, set on edge and fastened together; that the sides of the several planks constituting this flooring were bevelled in such wise that the nails holding them together were driven in at the sides of said planks and would not project above the surface. The testimony of the plaintiff is that he was making the run on this runway, and just as he delivered the ball his foot caught and he was thrown. It is said that just back of this runway was an ordinary floor, not designed for patrons of the alley to run upon to get the momentum with which the ball was to be thrown, and that such running was to be done on the runway proper, and that it must be that the nail, on which the foot of the plaintiff caught, projected from this part of the floor, not designed as a runway and not laid for the purpose of having the patrons run upon it to get the momentum necessary before throwing the ball, and that the plaintiff must have been negligent in running upon a part of the floor not designed for the purpose. The plaintiff says that his way of delivering the ball was to take two running steps and then glide his foot a little way and then deliver the ball, and it was while thus gliding that his shoe caught upon the nail; but he says that the nail was within about four feet of what is called the foul line, which is the line beyond which the bowler must not go in delivering the ball. This is the dividing line between the runway and the alley way proper. The runway was fourteen or fifteen feet in length, and if the plaintiff is right as to the distance of the nail from the foul line, it must have been in the runway.

When the plaintiff fell he says that half his body, or more than that was lying on what is called the gutter, which, as shown by the drawing produced by the defendant, extends alongside of the alley proper and terminates at the foul line, so that there is no gutter by the side of the runway, and if the plaintiff is right about this, he is probably right as to the place where his foot caught, although he is uncertain as to some of the distances mentioned by him.

Notwithstanding the less likelihood of a nail working up from planks put in as those were which formed the runway and the alley (the nails being driven in at the sides), than from the planks which formed the floor just before the runway and alley was reached, we think it by no means impossible or even improbable that a nail may have worked up, and if it had so worked up as to project above the surface of this runway, a proper inspection of this runway would have disclosed that fact to the defendant. We think from the evidence that the jury might well have found that this nail, though when the construction was made, it was driven below the surface of the runway, had worked up and that it had continued to work up without having been again driven back into place, and that this working up must have continued for such a length of time that the defendant by the exercise of proper care would have known of it. It was the business of the defendant to use all reasonable means to make this place of amusement safe. It is the duty on the part of the proprietor of resorts like that of the defendant to use reasonable care in the conduct of such places, as pointed out in Vol. 1, *Thompson on Negligence*, Section 996, in which this language is used:

“Doubtless the true theory is that such persons assume the obligation of exercising reasonable care, and that what will be reasonable care will be a degree of care proportioned to the danger incurred, and to the number of persons who will be subjected to that danger. A good expression of the rule of liability, applicable in such cases, is found in an English case to the effect that the proprietor of such a structure is not a *warrantor* or *insurer* that it is absolutely safe, but that he impliedly warrants that it is safe for the purpose intended, save only as to those defects which are unseen, unknown and undiscoverable, not only unknown to himself, but undiscoverable by the exercise of any reasonable skill and diligence, or by any ordinary and reasonable means of inquiry and examination. Such being the nature of the obligation, it is obvious that the proprietor of such a building is under a continuing *duty of inspection*, to the end of seeing that it is reasonably safe for the protection of those whom he invites to come into it; and that if he neglects his duty in this respect, so that it becomes unsafe, the question of his *knowledge* or *ignorance* of the defect which renders it unsafe is immaterial.”

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To the same effect is the case of *Currier v. Music Hall Association*, 135 Mass., 414, the syllabus of which reads:

“The proprietor of a hall to which the public is invited is bound to use ordinary care and diligence to put and keep the hall in a reasonably safe condition for persons attending in pursuance of such invitation; and if he neglects his duty in this respect, so that the hall is in fact unsafe, his knowledge or ignorance of the defect is immaterial.”

It is not at all certain that the jury came to a wrong conclusion in finding that the defendant failed to exercise such reasonable care as the law requires, and the result is that the judgment is affirmed.

INJURY IN MACHINERY CLAIMED TO BE DEFECTIVE.

Circuit Court of Cuyahoga County.

THE FOREST CITY PROVISION COMPANY V. ADOLPH BLAHA.

Decided, June 28, 1910.

Charges—Failure to Define Issues.

It is reversible error for the court to neglect to state the issues in a case to the jury, where there are several issues of fact to be determined by it, and to refer the jury to the pleadings for a determination of the issues, notwithstanding the court at the conclusion of the charge asks counsel if they have anything further to which to direct attention and they answer in the negative.

Seaton & Paine, for plaintiff.

A. W. Lamson and W. B. Beebe, contra.

MARVIN, J.; WINCH, J., and HENRY, J., concur.

The relation of the parties here is the reverse of their relation in the court below. The terms plaintiff and defendant as used in this opinion, refer to the parties as they stood below.

The plaintiff was an employee of the defendant and worked on a sausage machine; on the 18th of June, he was injured to such an extent that one of his arms had to be amputated.

He complains in his petition that this injury was occasioned by reason of the negligence on the part of the defendant in failing to furnish him a proper machine at which to work. A very considerable number of defects in this machine are stated in the petition. Issue was taken on these several charges of negligence by the defendant.

Numerous grounds of error are claimed to have occurred at the trial.

It should be said that the arm of the plaintiff was injured by receiving a severe blow from what is called the plunger in this sausage machine. We do not undertake here to give a description of the machine but content ourselves in saying that the injury *was* received from this plunger.

One of the charges of negligence in the petition was that the machine was being operated at an extremely high steam pressure.

Before argument, the court said to the jury, at the request of the defendant, among other things, the following:

“Among the allegations of negligence in the petition is one that defendant was negligent in operating said sausage machine at an extremely high steam pressure at the time of the injury to plaintiff.

“The court says to you that no evidence has been offered to sustain said allegation of negligence and the charge of negligence in this respect is not to be considered by you.”

Going to the general charge the court said to the jury among other things the following:

“There are various allegations of negligence of the defendant company that are set forth in the petition at great length. He claims that he was injured in this way: His arm was taken off, he suffered great pain in body and mind; and was damaged to the extent of \$25,000; that he was without fault or negligence on his part.”

After then stating that all negligence was denied on the part of the plaintiff, the court said, among other things, to entitle the plaintiff to recover it is incumbent upon him to show by a preponderance of the evidence that the defendant company was negligent in the respects complained of in the petition or some

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of them, and that the injury which the plaintiff received resulted directly from such negligence.

The court further said to the jury:

“The allegations of negligence which will entitle the plaintiff to recover are the allegations of negligence that are contained in his petition; he doesn't have to prove them all; if he proves any of the acts of negligence that was the proximate cause—that was the thing which caused his injury and he had proven that part by a preponderance of evidence, then he is entitled to a verdict.”

What has been quoted contains all that was said by the court as to the issues made by the plaintiff. It has already been said that numerous items of negligence were alleged in the petition, all of which were denied by the answer. Attention has already been called to the fact that the court instructed the jury before argument, that no evidence had been introduced as to one of the grounds of negligence charged in the petition, and yet the court here leaves to the jury to ascertain by an examination of the petition, and that alone, the negligent things which must be shown by the plaintiff in order to entitle him to a recovery. The court ought not to have left to the jury to search out from the petition the items of negligence charged. It left them to look to the petition and for every charge of negligence contained in it, and yet he had already said to them, there was no evidence tending to show negligence in one item charged. The court should have pointed out the several charges of negligence contained in this petition to which the attention of the jury must be given to reach a proper conclusion.

It is urged that because at the close of the charge this took place, to-wit, the court said, “Has either side anything further to direct my attention to,” to which both parties by their counsel answered “No, we have not”; this error, if there was an error on the part of the court in failing to point out the issues, was cured, or rather that the defendant can not now be heard to complain because of the failure of the court to properly state the issues in the case.

We think this is answered by the case of *The Baltimore & Ohio Railroad Co. v. Lockwood*, 72 Ohio St., 586, the syllabus of which case reads:

“In submitting a case to the jury, it is the duty of the court to separate and definitely state to the jury, the issues of fact made in the pleadings, accompanied by such instructions as to each issue as the nature of the case may require; and it is also the duty of the court to distinguish between, and call the attention of the jury to, the material allegations of fact which are admitted and those which are denied. It is error to read the pleadings to the jury and then say to the jury, and not otherwise to define the specific issues, that these constitute the pleadings in the case, which make up the issue and from which they will try and determine the controversy between the parties.

“It is error to refuse to charge the jury that it should not consider any other negligence than that charged in the petition.”

In this case the trial court said to the jury:

“There can hardly be any question in your minds, gentlemen of the jury, at this stage of this trial, after hearing the general argument of counsel and the several requests the court gave you and the reading of these pleadings, that the issue in this case is negligence or want of ordinary care, complained of on part of the railroad and denied by the railroad company, and allegations as to contributory negligence on the part of the plaintiff, which resulted in this accident.”

Judge Davis in his opinion uses this language, in reference to that part of the charge:

“The court thus left it to the jury to find out for itself what were the specific issues of fact as made up in the pleadings, and which it was the duty of the jury to decide from the evidence, under the instructions of the court. The court intimates to the jury that ‘the issue’ is negligence ‘on the part of the railroad company,’ and the contributory negligence ‘on the part of the plaintiff.’”

The opinion then goes on to show that there were several charges of negligence in the petition, and then says:

“It is the imperative duty of the court to separate these and to definitely state to the jury those issues which are to be determined by it, accompanied by such instructions in regard to each as the nature of the case may require. A failure to do this necessarily leaves the jury to grope around through the technical and often verbose allegations of the pleadings to find the real points of controversy in the case. When there is but a single

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issue, which is tersely stated, this might not be prejudicial to the parties; but in almost every case there are intricacies which the jury, from lack of legal knowledge and experience, can not unravel without the assistance of the court. The jury should be distinctly instructed by the court as to the facts which are admitted; and without this it can not be expected that a jury trial will result in an intelligent verdict."

Our attention is called to the case of *Railroad Co. v. Ritter*, 67 Ohio St., 53, in which this language is used in the syllabus:

"Where the charge of the court is free from error prejudicial to the party excepting thereto, but fails to cover all the questions involved in the case, such failure is not a ground for reversal, unless it was called to the attention of the court, and further instructions requested and refused, provided the jury is not misled by the charge so given."

This is cited in support of the proposition that the defendant, having been called upon in this case to ascertain if there was any point on which instructions were desired that had not been given, answered *no*.

It was undoubtedly because of what is said in this last named case that the court used the language quoted in the 72d Ohio St., *supra*, because in the case of *Railroad Co. v. Ritter*, *supra*, the court left the jury to determine the issues from the pleadings. But the court in its opinion in that case, used these words:

"It is well at this point to recall the very simple and narrow issue between these parties in the trial court, for it has much to do with our conclusions. The pleadings brought the issues into a very narrow compass."

Judge Davis, in the opinion in *Railroad Co. v. Lockwood*, *supra*, recognizing what was said in *Railway Co. v. Ritter*, used the language already quoted, to-wit: "When there is but a single issue which is expressly stated, this might not be prejudicial to the parties."

We think in the present case the court erred in not following the statute requiring that the issues be stated, and that it was not incumbent upon the defendant to point out to the court specifically what it regarded as erroneous in the charge, even

though asked if it desired to direct the attention of the court to anything further. The court had itself directed attention to the issues and had erroneously instructed the jury to ascertain from the pleadings what these issues were, and as already * * * stated, the defendant was not called upon to point out to the court wherein the charge was erroneous, but at most to call the attention of the court to some matter entirely omitted in the charge.

On the authority of *Railroad Co. v. Lockwood*, *supra*, this judgment must be reversed for error on the part of the court in failing to properly state to the jury the issues in this case.

An examination of the record fails to disclose any other reversible error and for this error in the charge, and this alone, the judgment is reversed and the cause remanded for further proceedings.

SERVICE OF SUMMONS AT RESIDENCE CONTRADICTED.

Circuit Court of Cuyahoga County.

LEWIS MAYER ET AL, PARTNERS AS MAYER, SCHEUER, OFFNER &
Co. v. THOMAS H. GROVES.

Decided, November 9, 1910.

Judgment—Vacating for Want of Service—Evidence.

A judgment will not be vacated because of no service on the defendant, where the evidence contradicting the return of the sheriff of residence service is not clear and convincing.

Burrows & Mason, for plaintiffs in error.

Kline, Tolles & Morley, contra.

MARVIN, J.; WINCH, J., and HENRY, J., concur.

The facts in this case are that on the 17th day of May, 1899, the plaintiffs filed a petition in the court of common pleas of this county against the defendant; that on the same day a summons was issued to the defendant on said petition, addressed to the sheriff of said county. Said summons was duly returned into

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court on the 24th day of May, 1899, with the following endorsement:

“State of Ohio, Cuyahoga County, ss: On the twenty-third day of May, 1899, I served this writ on the within named Thomas H. Groves, by leaving a true and certified copy thereof at his usual place of residence. Thomas F. McConnel, by John J. Many, Deputy.”

On the first day of June, 1899, appears this entry on the docket of the court of common pleas in this case:

“June 1, 1899, to court: Leave to answer by July, '99. Journal 135, p. 355.”

No answer or other pleading was ever filed in said cause by the defendant, and on the 11th day of March, 1901, the case coming on regularly to be heard upon the petition of the plaintiff, a jury was empaneled and sworn; the plaintiff offered its evidence; the jury found for the plaintiff and assessed its damages at \$1,441.16, and interest at 6% from the 4th day of January, 1901, together with a recovery for costs.

On the 12th day of August, 1899, a petition in involuntary bankruptcy was filed in the District Court of the United States and for the Eastern Division of the Northern District of Ohio, and among the debts scheduled in the proceedings filed in said petition in said district court, was of the indebtedness upon which the plaintiffs recovered their judgment.

On the 9th day of June, 1900, the defendant was discharged in said bankruptcy proceedings.

On the 19th day of July, 1909, a motion was filed in the Court of Common Pleas of Cuyahoga County to vacate said judgment so obtained by the plaintiff on the ground that no service of summons was ever made upon the defendant, and that he had no notice of the institution or pendency of the action in which said judgment was taken, and that he had no knowledge that he had been sued in said action until the 20th day of April, 1909,

Upon the hearing of said motion on the 20th day of December, 1909, the same was granted and said judgment was suspended until the final adjudication of the facts claimed by the defendant. Thereupon, on the same date, the defendant filed his answer in

said cause, setting up said bankruptcy proceedings and his discharge therein. On the 29th day of January, 1910, the cause came on for hearing in said court of common pleas and judgment was rendered in favor of the defendant. The present proceeding is brought seeking to reverse the order setting aside said judgment. That motion was heard upon the evidence, all of which is before us in a bill of exceptions. From this evidence it is urged that the court was not justified in making said order of vacation. We have no doubt of the authority of the court to make the order, if the facts were as claimed by the defendant as to the service of the summons and his want of knowledge of the pendency of the action in which the judgment was taken. The evidence on which the defendant relies is the testimony of himself and wife. He testifies in positive terms that no summons was served upon him nor to his knowledge left at his residence. He says in an affidavit which was introduced in evidence on said motion, that at the time said summons appears by the return of the sheriff to have been served upon him, he resided near the corner of Euclid and East Madison avenues in the city of Cleveland, in said county, and that the house was occupied by none other than himself and wife at the time. He further says that he never received a copy of the summons and never had any knowledge of the institution of the suit until the 20th of April, 1908; that during the months of May, June and July, 1899, the Hon. E. J. Blandin, an attorney in Cleveland, was his attorney, whom he consulted on all legal matters in which he was then involved, and that he never authorized him or any other attorney to appear in said suit for the purpose of obtaining extension of time for answer or for any other purpose.

His wife, in an affidavit filed in evidence on the hearing of the motion says that during the month of May, 1899, she and her husband resided in the house mentioned by the defendant in his affidavit; that at the time the only inhabitants of the house were herself and her husband, and she says:

“I was at home during the month of May, 1899, and no copy of a summons issued by the Court of Common Pleas of Cuyahoga County was left at our residence during that month, and

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I never knew of the institution of the above entitled action or of the recovery of a judgement against my husband thereon until April, 1909."

So far as this statement of Mrs. Groves is concerned, it may be true, as far as it went, and still a summons may have been served at that residence as stated in the return of the sheriff. She does not say that she was at home "all" of that month, and even if she did, it might well be that using the words in the sense in which people ordinarily use the words "I was at home during the entire month" it would not mean that she was not out of the house at any time during said month, or that she might not have been away for many hours, or some particular day of that month, or absent for a considerable part of several days. Judge Blandin's affidavit as filed shows that he never appeared for the defendant in this action, nor had he any knowledge that such action was pending. On the other hand is the evidence of the return of the sheriff. This can only be overturned by clear and convincing evidence, as was said by this court in the opinion delivered on the 21st day of February, 1905, in the case of *John C. Keefe v. James W. Everden*.

Next is the entry on the court docket, showing an extension of time for answer in the then pending action in the court of common pleas. This extension was made before the answer was due and extended the time but two weeks beyond which the defendant would have been required to answer had no extension been given. Yet it is inconceivable that the court should have made this entry on its own volition. Somebody must have appeared and asked for this extension, and it can hardly be doubted that, whoever this person was, concerning which the record is silent, he was an attorney, recognized by the court, or it was the defendant himself. Presumably it was an attorney at law, and it would require strong evidence to convince one that an attorney, without any authority in the premises whatever from the defendant, should have appeared and made the application. There is further the affidavit of Mr. George H. Burrows, a reputable attorney of this bar, filed about the 1st of June, 1899; who had a conversation with the defendant in which the defendant said: "I am sorry you brought the suit

against me for Mayer, Scheuer, Offner & Company for the reason that the claim is large and it is apt to bring other creditors upon me." He says further that in that conversation Mr. Groves said to him (Burrows) that Mr. Frank Skeels, who was then an attorney practicing in Cuyahoga county, Ohio, represented him in the matter of Mayer, Scheuer, Offner & Co., as well as in a number of other cases which were pending against him before justices of the peace.

In another affidavit Mr. Burrows testifies that he had a talk with Mr. S. H. Tolles, an attorney at this bar, in the spring of, or summer of 1901, in which Mr. Tolles said to him that Groves had written to him about this judgment and that he had decided to take no action whatever in the matter; that Groves had received his discharge in bankruptcy and that the judgment was absolutely worthless against Groves. Mr. Tolles files his affidavit in which he says that he has no recollection of any such conversation with Mr. Burrows, nor of having received any letter from Groves on this subject, and that he is unable to find any such letter in the files of his office. Mr. Burrows produces copies of a considerable number of letters written by him or his firm to Mayer, Scheuer, Offner & Co. after the suit was brought. One of these letters is dated July 15, 1899, in which it is stated that the attorney for Mr. Groves had telephoned Mr. Burrows that he was trying to arrange to raise money to avoid the litigation, and requested that no snap judgment should be taken on him and that they would not file an answer for a little time if Burrows would consent not to take a judgment until after the date of the letter. Another letter of August 9, 1899, written by Burrows to his clients, says that he had a talk that day with Groves in which Groves said that they would soon be able to pay something. Other letters were introduced which tended to show that either Mr. Burrows was preparing himself to be able to say that Groves knew of the pendency of the action or else Burrows in the letters told the truth.

There is also filed the affidavit of W. E. Rice, a reputable attorney of this bar, not now a practicing lawyer at this bar, but a reputable man, and at the time this judgment was taken a

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partner with Mr. Burrows in the practice of law; he says in his affidavit: "that subsequent to the filing of the petition in the case within a week or ten days, he saw Groves and Groves told him not to carry out the suit to judgment and he would pay the claim of the plaintiffs in weekly installments." He says that Groves talked freely about the suit having been brought, saying that he was sorry that the attorneys for the plaintiffs had been so expeditious in bringing the suit, as it only added to the expense and they would not get the money any quicker by reason of the suit.

From this and the other evidence introduced on the hearing of the motion it seems to us that not only was the evidence clear and convincing that Groves was not served with summons but that it is on the other hand clear that he was and that in any event he knew of the pendency of that suit at the time it was pending and before judgment was entered in it.

The result is that the judgment of the court of common pleas must be reversed and the cause remanded.

RESTRICTION AS TO CHARACTER OF BUILDINGS WHICH MAY BE ERECTED.

Circuit Court of Cuyahoga County.

CHARLES D. BOEHME ET AL V. MILTON E. BERTRAM.

Decided, November 14, 1910.

1. A restriction in a deed that the premises conveyed shall be used for "residence purposes only," means that a residence for one family only can be erected upon the premises.
2. One owner in an allotment who himself has violated such a restriction can not enforce it against another owner in the same allotment.

F. E. Bruml, for plaintiffs in error.

White & Crosser, contra.

MARVIN, J.; WINCH, J., and HENRY, J., concur.

The facts in this case are these:

There is an allotment of land in the city of Cleveland in this county known as Schatzinger & Tomain's Subdivision. This

allotment contains a large number of lots, most if not all of which have a frontage on the several streets of forty feet and a depth of one hundred and twenty-five. One of the streets passing through this allotment is No. 124.

A general plan and scheme was adopted by the original proprietors of this allotment by which the several lots were to be used for the purpose of dwelling-houses only. The original deeds for the lots fronting on 124th street had a restriction reading, "that said premises shall be used for residence purposes only; that no intoxicating liquors of any kind shall ever be sold or manufactured on said premises." The plaintiffs are the owners of lot No. 58 fronting on said 124th street. The defendant is the owner of lot No. 59, which fronts on the same street and adjoins said lot owned by the plaintiffs. The plaintiffs have erected on their said lot a dwelling-house, suitable and used for the residence of one family only.

Unless restrained by the order of the court the defendant will erect on his said lot a residence suitable and intended for the residence of four families. The purpose of the present action is to obtain an order perpetually enjoining the defendant from erecting the said four family building and residence.

Residences suitable and intended for the occupation of two families each have been erected on several of these lots fronting on 124th street and without any objection or remonstrance on the part of the plaintiffs or anybody else.

The plaintiffs themselves accepted a deed for one of the lots in this allotment containing a restriction that no residence for more than two families should be erected on the lot conveyed by such deed, and they conveyed this lot to another party with a like restriction.

The only question raised and the only defense here made by the defendant is that the plaintiffs are estopped from interfering with the defendant in the erection of the residence which he proposes to erect; and that is, a residence suitable for four families.

Our Supreme Court have decided in the case of *The Linwood Park Co. v. Dudley et al*, 63 Ohio St., 183, that where a lease contains a provision that the lessee would use such premises

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for the purpose of a private dwelling or a residence only, that the letting out of rooms to temporary occupants in any dwelling on the leased premises was a violation of the restriction. And, in the case of *Rose v. King*, 49 Ohio St., at p. 213, it is held that a four-story building occupied by three families living in separate apartments on the second floor, and by two families living in separate apartments on the third floor, numbering in all sixteen persons, all tenants of one owner, is a tenement house as distinguished from a family residence, within the meaning of the statutes providing for the protection and the regulation of tenement houses. And we think that it may be regarded as settled that in Ohio, a restriction such as that contained in the deeds already mentioned, is violated by the erection of a dwelling, suitable and intended for the use of more than one family. That being so, it is clear that the original general plan of this allotment has been violated and the restriction in the deeds has been violated by each person who has erected a dwelling fitted for more than one family, and it is clear from the facts in the case, as has already been stated, that this has been done with the assent, that is, without any complaint on the part of the plaintiffs. And we therefore reach the conclusion that the general plan and the restriction in reference to the number of families for which a dwelling may be erected have been waived by the plaintiffs, and that they can not now be heard to complain that one is violating a restriction when he erects a dwelling suitable for four families. Because, having assented to the violation of the restriction (which we hold to be that dwellings shall be erected for one family only), to the extent of assenting to their being used for the residence of more than one family in each dwelling-house, it is not now in the mouth of the plaintiffs to say what number of families may be provided for in a dwelling-house on one of these lots.

The result is that the petition of the plaintiff is dismissed.

PUNISHMENT FOR CONTEMPT.

Circuit Court of Cuyahoga County.

S. A. GROSSNER V. STATE OF OHIO. *

Decided, November 14, 1910.

Criminal Law—Re-sentence—Accused Having Served Part of Original Erroneous Sentence.

1. Matters of record in the trial court of which it takes judicial notice must be embodied in a bill of exceptions to be considered by a reviewing court.
2. It is no objection to a re-sentence of one whose first sentence has been reversed by a reviewing court and the cause remanded for re-sentence, that the plaintiff in error has suffered some part of the original erroneous sentence.

MARVIN, J.; WINCH, J., and HENRY, J., concur.

The plaintiff in error, who is an attorney at law, was, by order of the court of common pleas, enjoined from proceeding with certain cases in which he was attorney before a justice of the peace. He violated the order and proceeded with and obtained judgment in a number of the cases. Being brought before the court in proceedings in contempt, he was found guilty and sentenced to be imprisoned in the county jail for ten days. He was further ordered to cause said judgments so taken before a justice of the peace to be vacated, and in default of so doing, that after the expiration of said imprisonment for ten days, he be confined in the county jail until he should so comply, or be otherwise discharged by due course of law. To this judgment and order he prosecuted error to this court. Before we proceeded to the hearing we required that he should cancel his judgments before the justice of the peace, which he did. The error proceeding was then heard in this court, which found that there was error in the sentence, in that the court was without authority of law to commit the accused to prison, and the order made was

*Affirmed without opinion, *Grossner v. State*, 86 Ohio State, 318.

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that the judgment of sentence be reversed and the case remanded to the court of common pleas for judgment and resentence in accordance with Section 5581, Revised Statutes. Thereupon, said last named court sentenced him to pay a fine of \$200 and in default thereof sentenced him to be committed to close confinement in the jail of said county until he shall comply with said order or be otherwise discharged by due course of law, and error is now prosecuted here to said last named sentence.

The section under which the order of this court directed sentence to be pronounced, so far as it authorizes sentence for contempt, reads:

“And such party may be required by the court or judge to pay a fine not exceeding \$200, for the use of the county, to make immediate restitution to the party injured, and to give further security to obey the injunction and, in default thereof, he may be committed to close custody until he complies with such requirement or is otherwise legally discharged.”

It will be noticed that the sentence now under consideration conforms exactly with the statute and therefore that the court did just what the mandate of this court required should be done. It would seem to follow necessarily, that, if there is any error in the matter, it can be traced readily and directly to this court rather than to the court of common pleas. The order of this court was in full force when such sentence was pronounced, and still remains in full force.

It is urged, however, that before said last sentence was pronounced, the plaintiff in error had served a part of the term of imprisonment imposed by the erroneous sentence, and that therefore no new sentence, imposing other punishment, could be imposed.

We look in vain to the record to find the fact of any imprisonment having been suffered by plaintiff in error, under such sentence. If that fact were material in determining the question before us, it could easily have been brought into this record. Either evidence of the fact could have been submitted to the court at the time of the sentence, and embodied in a bill of exceptions, or if it was a fact of which that court would have

taken judicial notice, as is contended here, that should have been made to appear by record, and brought to this court.

If it be contended that a reviewing court is to take judicial notice of all the trial court is bound to take judicial notice of, the contention can not be upheld. A familiar example of this is found in cases where prosecutions are held before a police court for the violation of municipal ordinances. The police court will take judicial notice of the ordinances of the municipality, but the reviewing court will not do so, and the ordinance must be brought by proper record into the reviewing court before that court will reverse because of anything that depends upon such ordinances; if this were not so, the Supreme Court of the state would be required to take judicial notice of the ordinances of every municipality in the state, which would be an impossibility.

Where error proceedings are prosecuted in such cases the court will presume, in the absence of any record to the contrary, that the trial court did not err as to the construction and application of the ordinance, unless it be that the ordinance relied on is one which the municipality was without authority of law to pass. As for instance, that one is prosecuted and convicted of doing some act which could not be in violation of any valid ordinance.

These distinctions have been pointed out in various cases in this court. See *Nelson v. Berea*, 21 C. C., 781.

But, it is said, this court should look to an affidavit filed here, showing that plaintiff in error had suffered imprisonment under the first sentence.

We know of no provision of law, or precedent, which would authorize us to take this affidavit into consideration, and we have not done so.

But we are of opinion that whether the party had suffered some part of the punishment inflicted by the first sentence or not, the trial court was not without power to sentence after the case was remanded, exactly as it could have sentenced in the first instance.

The case of *Lee v. State*, 35 Ohio St., 113, is not in conflict with this view. In that case, when the court came to re-sen-

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tence, no part of the punishment inflicted by the first sentence had been suffered, and that fact is mentioned in the opinion, and in the syllabus; but it does not follow that even in that case, where the court of its own motion and at the same term in which the original sentence was pronounced vacated such sentence and pronounced a new sentence, the court might not have pronounced such new sentence, even though some part of the first had been carried out.

If the contention of the plaintiff in error is sound, it would easily result in consequences too absurd to be seriously considered.

To illustrate: One might be convicted of the crime of manslaughter; the court might erroneously sentence to imprisonment for life. Upon proceedings in error being prosecuted, the judgment of sentence would be reversed and the case remanded for re-sentence, the court then pronouncing sentence that the defendant be imprisoned for the period of five years. It is needless to speculate on whether such sentence would be reversed on proceedings in error. No one would ever have the hardihood to bring such proceedings, even though, before the judgment of reversal, the prisoner had suffered months of imprisonment under the first sentence, before the reversal of the first sentence.

Judgment affirmed.

SIGNATURE PLACED ON NOTE AFTER MATURITY.

Circuit Court of Cuyahoga County.

J. M. DWINELL V. M. A. SPRAGUE.

Decided, November 28, 1910.

Promissory Note—Third Party Signing After Maturity on Promise of Extension of time to Maker.

One who, upon request of the payee, but without knowledge of the maker, of a matured promissory note, signs said note as a maker, upon the agreement of the payee that he would extend the time for payment of the note, becomes personally liable thereon.

D. T. Miller, for plaintiff in error.

E. H. Tracy, contra.

MARVIN, J.; WINCH, J., and HENRY, J., concur.

The parties here are reversed from the relation in which they stood to each other in the court of common pleas. The terms plaintiff and defendant, as used in this opinion, will refer to the parties as they were in the original case.

The plaintiff filed a petition against H. N. Porter and J. M. Dwinell upon a promissory note, in the ordinary form, for \$94.60, dated January 15, 1896, payable eight months after date. This note was signed on its face by the two defendants above named. On the back of the note, besides certain endorsements of payments, is this endorsement: "October 21, 1896, time extended eight mo. from this date. M. A. Sprague per H. J. Fitch."

No service of summons was had upon Porter. Dwinell filed an amended answer, in which he set up as a defense that the note was originally given and signed by H. N. Porter alone, and that the consideration for the note was given to H. N. Porter that on the 21st day of October, one H. J. Fitch, who was the duly authorized agent of the plaintiff, Sprague, came to him (Dwinell) and requested him to sign his name on said note, stating that if he would sign the same as surety the time

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of payment thereon would thereby be extended to the defendant Porter for a period of eight months; that he (Dwinell) in pursuance of such request of said Fitch, and at the request of no other person or persons, so signed said note; whereupon the endorsement, already mentioned, of October 21, 1896, was made. He says that Porter never requested the plaintiff to secure or attempt to secure the signature of Dwinell, and that Porter was wholly ignorant of the fact, that the plaintiff intended to request him to sign the note, and that at the time and for several years thereafter, Porter was wholly ignorant of the fact that he (Dwinell) had signed the note or that there had been any extension of the time of payment.

To this answer the plaintiff filed a demurrer and that demurrer was sustained. Thereupon the case was submitted to the court, without the intervention of a jury, upon the pleadings and evidence; on consideration whereof the report found for the plaintiff and assessed the damages at the amount appearing upon the note to be due, including interest.

No transcript of the evidence is filed here, and the only error claimed is that the court erred in sustaining the demurrer to the answer, and in entering judgment for the plaintiff.

Of course if this answer was good and if the evidence sustained it, the judgment was erroneous. But we are of opinion that the court did not err in sustaining this demurrer. The answer stated no defense.

It is urged on the part of the plaintiff in error that the signing by Dwinell was without consideration. But if the plaintiff was bound by the endorsement entered on the back of the note on the 21st of October, which, as the answer alleges, was placed thereon, because of the signing of the note by Dwinell, then there was sufficient consideration for this signing, for by that endorsement the plaintiff bound himself to refrain from forcing collection from Porter for a period of eight months from the time of such endorsement and at the time the endorsement was made the note had matured, and the plaintiff prior to such endorsement had a present right of action against Porter. By this endorsement he bound himself not to proceed upon such present right, and that was a sufficient consideration. The fact that

Porter knew nothing of this agreement does not defeat the contract, for if an effort had been made to enforce payment at once against Porter, it would have been his right to take advantage of this contract made for his benefit between the plaintiff and Dwinell, the plaintiff having received a consideration for his promise to defer, in that he obtained the signature of Dwinell upon the note.

On the part of the plaintiff it is urged that the signing of the note by Dwinell constituted a material alteration of the note which had the effect of releasing Porter, and made the instrument, after it was signed by Dwinell, simply the note of Dwinell, and that therefore there was a sufficient consideration on the part of Sprague for this signature of Dwinell; that, in effect, it was a release by the plaintiff of Porter from liability from the note, and the acceptance of a note from Dwinell in its stead. Authorities are not wanting for this claim, but whichever view is the right one, whether it be that Dwinell made himself liable to Porter either as a principal or surety, or whether by reason of the alteration of the note he became the only party liable upon it, in either case Dwinell would not be released from liability, and the demurrer was properly sustained.

The judgment of the court was right and is affirmed.

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DATE OF DETERMINATION OF A SPENDTHRIFT TRUST.

Circuit Court of Franklin County.

WORTHINGTON E. BABCOCK, GUARDIAN, BRUNSON MONYPENY
AND WILLIAM MONYPENY V. WILLIAM MONYPENY, AS
EXECUTOR AND TRUSTEE.*

Decided, March, 1911.

Wills—Construction of Clause Creating a Spendthrift Trust—Distribution Upon Termination of Trust.

1. The spendthrift trust created in the will under consideration should be terminated and the trust raised on the day named for distribution in the will, the income to go to the beneficiary during life and to his children after his death.
2. The term "sinking fund" as used by the testator refers to accumulations of the principal of the estate derived from sales of personal or real property for the purpose of reinvestment.

ALLREAD, J., DUSTIN, J., and FERNEDING, J., concur.

Heard on appeal.

This action involves a construction of the last will and testament of William Monypeny, deceased, and is brought here on appeal.

William Monypeny died September 12, 1899, leaving a will dated September 23, 1895, and a codicil dated September 7, 1899. Four children and a grandchild representing a deceased son survive the testator.

George B. Monypeny has since deceased, leaving the plaintiff's wards, his children, and Marie R. Monypeny, his widow.

Item 1 of the will of William Monypeny provides for the payment of debts; item 2, a specific bequest to his widow, and item 3, an absolute gift to a daughter.

The controverted questions of construction are involved largely in items 4 and 5 as amended by the codicil and relate to the interests growing out of the share of George B. Monypeny.

*Affirmed without opinion, *Babcock v. Monypeny*, 86 Ohio State, 303 and 365.

Item 4 trustees the residuum of the estate for distributory purposes, while item 5 provides for family annuities pending distribution of the residuary or distributory trust.

Item 4, after creating the general trust, defines its purposes in three clauses. The first clause directs a trust to be raised out of his estate on or before November 18, 1902, for the benefit of the testator's son Perin and granddaughter Maybelle as the representative of the deceased son, and to be charged against them in final distribution. This trust was to be carried forward and finally settled and paid to them November 18, 1912.

The second clause creates a spendthrift trust of the shares of William and George B., and its more important features may be quoted as follows:

“(2) I hereby order and direct that a further trust shall be raised out of my estate and be held and invested by my executors * * * the two whole, full and equal shares and all and singular of the property thereof, and in amounts equal one with the other, of my entire estate, except and after deducting the special bequests and devises made to my wife and to my daughter in items second and third, respectively, of the will, for the use, benefit and behoof, after first charging them, respectively, with all advances theretofore had, of my two sons, William Monypeny and George B. Monypeny, their heirs and assigns forever, and the property thereof to be given, transferred and conveyed in fee to their legitimate children at their death by right of representation on the youngest child of each attaining his or her majority, or becoming of age under the laws of the state of Ohio, except as hereinafter provided. The net income arising therefrom after the payment of all taxes, assessments, proper insurance and repair charges, shall be paid quarterly or at such convenient times as may, in the judgment of said trustees, be proper to the said William Monypeny or George B. Monypeny or to their heirs. * * * In the event that one or both of my sons, William and George, die without issue of their body, or the issue of one or both dies or die without issue, said share or shares arising out of said trust shall be paid to my estate, except one equal distributive share thereof which shall go to and become a part and share of the trust hereof of the son or his issue then living. Should both of said sons and their issue all be dead before the execution and termination of this trust, then said fund thereof shall vest in and ascend to my children then living or to their issue by right of representation

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in equal distributive shares. The last two foregoing trusts are formed because my sons William and George have for years past been reckless in business affairs and of dissolute habits, thereby to a large degree disqualifying themselves from accumulating or taking care of property."

The third clause of item 4 provides for a full distribution on November 18, 1902, of the remainder of his estate, equally, among the remaining children and the granddaughter as the representative of the deceased son. By the codicil the spendthrift trust as to William is annuled and William is transferred to clause three, item 4, and thereby placed with the class entitled to receive their shares upon final distribution in their own right, with this statement:

"My reason for revocation of clause two of item 4, so far as the same affects my son William alone, is because in business and socially, he has conducted himself so well, that my confidence in him has been fully restored."

The codicil further provides that the

"Trust to be raised for the use and benefit of my son George B. Monypeny shall remain undistributed and unaffected."

The codicil also amends clause three so as to make the distribution day November 18, 1912, and the 5th item as amended by the codicil provides that—

"During the continuance of said trust provided in item 4th, that is to be ended on the 18th day of November, 1912, I hereby order my executors hereinafter named to pay to each of the following named persons either in money or such articles as his or her comfortable maintenance may require, as the judgment of the executors may deem best, but not to charge them, respectively, in the final distribution of my estate, to-wit:
* * * To William Monypeny \$2,000 per annum to be paid quarterly. * * * To George B. Monypeny \$2,000 per annum to be paid quarterly. * * * Said foregoing named amounts shall be paid from the net income from my estate * * * and in case the net income yearly of my estate shall amount to more or less than the aggregate annual amounts of the bequests above stated * * * then and in such event, said payment shall be made *pro rata*."

The first and most important question represented is as to the time when the spendthrift trust in favor of George B. Monypeny vests and becomes effective.

Upon this issue the guardian of the children of George B. Monypeny and his widow and executrix are in accord. Their contention is in favor of an immediate or at least an early vesting of the trust estate and the realization and enjoyment of the net income; while the trustees of the residuary estate contend that the trust in favor of George B. Monypeny is not to be "raised" or enjoyed until final distribution on November 18, 1912.

Counsel for the George B. Monypeny interests insist upon a literal reading and interpretation of the devising clause creating the spendthrift trust and of the direct reference thereto in other parts of the will. This contention, however, if accepted, does not settle the controversy, for even the literal reading of the devising clause does not fix or determine the time for the raising or creation of the trust estate. It is contended, however, in support of this theory that the court should apply the well known rule of construction favoring the immediate vesting of estates. The foundation of this doctrine of construction is found in the second syllabus of *Linton v. Laycock*, 33 O. S., 128, and is as follows:

"The law favors the vesting of estates and in the construction of devises of real estate, the estate will be held to be vested in the devisee at the death of the testator, unless a condition to such vesting is so clearly expressed that the estate can not be regarded as so vested without directly opposing the terms of the will."

This case follows and is in accordance with the principles of the common law which required or at least favored the vesting of the legal title to real estate. In the present case the legal title became vested in the general trustees and is carried forward until final termination of the trust and then transferred to the ultimate beneficiaries. This vesting of the legal estate in the general trustees answers the common law requirement. But assuming that the doctrine favoring the vesting of estates applies to the equitable right of George B. Monypeny to have

the trust raised and the income applied to his benefit, it does not follow in the application of the rule that the present possession or enjoyment follows the vesting of the right. It often occurs in the construction of wills that the right to an estate vests although the enjoyment be postponed. Conceding, therefore, the vesting of the equitable right of George B. Monypeny to the benefit of the trust to be raised in his favor, the time when the trust is to be raised and the net income enjoyed must be determined, as any other question of intention, from the interpretation of the will.

It is evident from a reading of the will that the distributory trust created in item 4 was to be carried forward over a period of time for the purposes of future distribution.

Clause one provides for a special advancement to the minor son and granddaughter and was directed to be raised on or before November 18, 1902. Clause 2 directs that:

“A further trust shall be raised out of my estate and be held and invested by my executors,” etc.

“A further trust” indicates an intention, to be considered along with that arising from the consecutive order, that the trust created by clause two is to be raised after that created by clause one. The phrase “raised out of my estate” alludes evidently to the act of separating the proportion or share therein specified from the body of the estate, giving it a separate existence. It is clear from a broader view of the entire fourth item, that clause two is distributory in its general character and deals with certain shares of the estate. The idea of equality of the final distribution of the residuum is clearly manifest. The language of clause two is unmistakable that subject only to certain deductions, the testator’s “entire estate” is to be divided into “equal” shares and that “two whole, full and equal shares • • • and in amounts equal one with the other, of my entire estate” are, according to the original will, to be raised and held for the benefit of William and George. This idea of equality is emphasized in the reason given in the will for the creation of the spendthrift trust as to the shares of William and George and by that given in the codicil for releasing

William's share from the trust and placing him with those who receive their shares absolutely.

The contention of those representing the share of George B. Monypeny in favor of an early vesting of the estate carries also as a necessary inference the immediate enjoyment of the net proceeds of the share. The effect of this contention is to give to William and George under the original will the income of their full share and also the annuity under item 5 payable out of the remaining shares. This contention is out of harmony with the general scope of the will and in conflict with the reasons expressly stated for the creation of the spendthrift trust and the releasing of William's share therefrom.

It would require clear and unambiguous language to exemplify an intention of rewarding the spendthrift sons with a double portion of the income at the expense of the others whose character and business capacity is not questioned. And it would be the every acme of absurdity to resolve doubtful language so as to effectuate an intention to take William's share from a favored clause and reduce his income and estate upon the sole ground of reformation and restoration to the testator's full confidence. The contention so made in favor of the George B. Monypeny interests comes in direct conflict with the manifest scope and express provisions of item 5, which provides for family annuities of certain amounts, including \$2,000 each to William and George. These annuities are required to be paid out of "the net income of my estate" and to be proportionately reduced or increased according to the amount of the income. It is further provided that these amounts are not to be charged against the respective parties "in the final distribution of my estate."

Counsel for the George B. Monypeny share contend that the phrase used in item 5, "net income of my estate" should be read "net income of the portion of my estate represented by clause three, item 4." In our opinion, it is more reasonable to harmonize items 4 and 5 and avoid conflict by reading item 5 as written, and reading into clause two of item 4 an apparent omission of the date of raising the spendthrift trust. This construction harmonizes all the items and clauses of the will and does violence to none.

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The phrase "except and after deducting the special bequests," etc., expresses the quantity of the estate to be divided rather than the time of division. The expression "as though said trust did not exist" in clause three of item 4 is designed to release from the trust of that clause the portion due a child whose share fails for want of issue, and to permit such share to remain in or become a part of the general estate for distribution the same as if the trust provided for in clause three did not exist as to such child. The condition in clause two, item 4, providing for the lapsing of the devise to one or both of the sons in case of death and failure of issue, speaks as of the day of final distribution and of an event which had then occurred, or might thereafter occur, and is, therefore, in the language used, consistent with the construction that the raising of the fund in favor of George and his children is to be substantially concurrent with the final distribution expressly fixed in clause three.

The fact that a portion of the estate of William Monypeny, deceased, consists of real estate located in the state of New York does not in our opinion affect the true construction of the will. There is nothing in the case or in the will to justify us in assuming that the testator knew of the statute laws of New York and acted with reference thereto or had specially in mind the laws of the state of New York affecting the distribution of his estate. Whether under the construction of the will given in this state the devise or any portion of it is void as to the real estate situated in New York is naturally a subject of determination by the New York courts.

It therefore follows under a true construction of the will the trust created by clause two, item 4, of the share of George B. Monypeny should be raised on or immediately prior to November 18, 1912.

The next question is as to the quantity of the estate taken by George B. Monypeny.

The guardian on behalf of his wards claims that the interest of George B. Monypeny, both in the principal and income, is limited to his life, and that upon his death all interest in the devise, both as to income and principal, become vested in his children.

On behalf of the widow and executrix of George B. Monypeny, it is contended first, that George B. Monypeny took a fee simple estate in the whole devise, and second, at least, in the full income provided for in the devise.

Upon the first question, we think it clear that while the first sentence in item 4, clause two, grants the use and benefits of the trust therein created to George B. Monypeny and his heirs and assigns forever, yet this apparently absolute estate is reduced by a subsequent grant equally distinct and clear of the "property" of the trust upon the death of George B. Monypeny in fee simple to his legitimate children to be subject to advancement and conveyance absolutely to them upon the youngest child becoming of age.

The net income under clause two of item 4 is payable to George B. Monypeny or his heirs. The disjunctive connection is intended to harmonize with the condition previously stipulated granting the estate to George B. Monypeny for life and upon his death to his children. The income is, therefore, payable to George during life and his children after his death, agreeably to the previous devise conferring the estate.

The amount payable to George B. Monypeny under item 5 becomes upon his death by virtue of item 7 payable to his children or their guardian.

The tenth item provides for a sinking fund from which improvements and betterments of the real estate may be made. The term "sinking fund" is ordinarily applied to accumulations from income to be used in the discharge of indebtedness. But in the manner in which it is employed in item 10, we think it refers to accumulations of the principal of the estate to be derived from the sales of personal or real property for the purposes of re-investment. This construction is necessary to harmonize with item 5, which fully provides for the distribution of the net income, deducting the expenses including necessary repairs to the real estate. The income of the estate is, therefore, in our opinion, fully provided for in item 5.

The discretion given to the executors in item 5 relates to the question of payment in money or articles for comfortable maintenance. The provision for payment of the annuities *pro*

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rata according to the income of the estate, either in money or articles of property, is absolute and can not be withheld and accumulated under the 10th item. George B. Monypeny was, therefore, entitled to the full *pro rata* share of the income of the estate under item 5 according to his annuity of \$2,000 per year, and his executrix is entitled to an accounting and the payment of any balance due. The annuity or *pro rata* share from the time of the death of George is payable to his children under item 7. Likewise, the net income of the share of George B. Monypeny under clause two, item 4, from the time it becomes available is payable to the children of George B. Monypeny and subject to advancements provided for in clause two, item 4, subject to the discretion of the trustees.

MISCONDUCT IN CHARACTERIZING DEFENDANT AS RICH.

Circuit Court of Cuyahoga County.

JOHN URBANOWICZ AND HEDWIG URBANOWICZ V. CYRIL ROMAN.

Decided, November 28, 1910.

Misconduct of Counsel—Reversible Error, When.

It is misconduct of counsel for plaintiff to say to the jury in his argument, of and concerning the defendant, "He is a rich man. How did he get rich? Just that way"; and where, upon objection by counsel for defendant, the trial judge neither reproves counsel, nor cautions the jury, and the facts are close, a judgment against the defendant will be reversed for such misconduct.

J. M. Downey, for plaintiff in error.

Henry Du Laurence, contra.

MARVIN, J.; WINCH, J., and HENRY, J., concur.

The parties are here reversed from the relation in which they stood to each other in the court of common pleas. The terms plaintiff and defendant as used in this opinion, will refer to the parties as they were in the original case.

The plaintiff sued the two defendants for services which he claims to have rendered for them as a farm hand from July, 1907, until January 15, 1908. He says that his work was performed at an agreed price of \$20 per month; that the aggregate for his services would amount to \$110; that \$48 had been paid to him for these services, and prayed for judgment for \$60, with interest.

The defendant, John Urbanowicz, answers admitting that the plaintiff worked for him on the farm; that the time was fifteen days less than the plaintiff claims; that the agreed price was \$15 per month, and that he has been paid in full.

The defendant, Hedwig Urbanowicz, answers denying that she is indebted to the plaintiff in any sum whatsoever, and denying that he ever worked for her.

The result of the trial in the court of common pleas was a verdict and judgment for the plaintiff in the sum of \$67.20.

The defendants prosecute this proceeding, claiming that the court erred in overruling the motion for a new trial in the case, on the ground that the verdict was against the weight of the evidence, and on the further ground that there was misconduct on the part of the attorney for the plaintiff.

An examination of the evidence shows that the plaintiff testified that he began working for the defendant, John Urbanowicz, on the 15th of July, 1907. He says that he continued to work for him until the middle of the following January. He testifies that he was paid by the defendant, John Urbanowicz, \$40.50 in money; that the defendant kept a store, and that he received from the store, to apply upon his pay, a pair of shoes and a pair of rubber boots, of the aggregate price of \$7.50. He testifies that when he applied for work he asked \$25 a month, that Mr. Urbanowicz said he would give him \$18 a month, and that they finally agreed upon \$20 per month. He says, besides the money wages which he was to receive, his board and washing were to be furnished by Urbanowicz.

The defendant, John Urbanowicz, says that the plaintiff began working for him not on the 15th of July, but on the 23d of July, 1907; that at the time of the employment, the price was not fixed, but it was agreed that the plaintiff should go to work and they

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would agree later on what his compensation should be, and that a few days after he begun to work, they agreed on \$15 per month. He says that the price agreed upon was fixed after the plaintiff had worked for him about a month, and he says that when the plaintiff quit working for him he settled with him for the entire amount which was coming to him, and he offers a small memorandum book in evidence as to the payments.

As to the defendant, Hedwig Urbanowicz, she is the wife of John, and she is the owner of the farm on which the work was done. The farm, however, was conducted and carried on by the defendant, John, and so far as the judgment against Hedwig is concerned, it should be reversed upon the weight of the evidence. The verdict and judgment against John are not so manifestly against the weight of the evidence as to justify a reversal on that ground. The jury heard the testimony of both parties, as well as other witnesses, and there was nothing improper about the story as told by the plaintiff, nor perhaps as told by the defendant. The jury saw fit to believe the claim of the plaintiff and we would not be justified in disturbing it.

As to the other claim, misconduct on the part of the counsel for the plaintiff, several things are complained of, but only one of them we regard as of sufficient importance to require any discussion at our hands.

During the address to the jury by counsel for the plaintiff among other things he said, referring to the defendant, John, "He is a rich man. How did he get rich? Just that way." Counsel for the defendant immediately appealed to the court, saying that he objected to the language. The court said: "Do you want the stenographer to take down the speech?" "The objection is overruled. Go on with your argument." We think this language of the counsel for the plaintiff was clearly improper to the degree that it constitutes misconduct. Earlier, in his address to the jury, counsel for the plaintiff had said, referring to the defendant: "He is a born liar." This language was in very bad taste, but the theory of the plaintiff was that what the defendant, John, said about the hiring and paying of the plaintiff was not true, and though the language used by counsel for plaintiff in this regard is by no means commendable,

we would not reverse the case for this, but what possible bearing could it have upon the case that the defendant was rich, or how he became rich? The language was clearly calculated to prejudice the jury and could have been used for no other purpose. It was not an issue in the case whether either the plaintiff or the defendant was rich as Dives or poor as Lazarus. If the plaintiff was entitled to recover, it was because he had performed work for the defendant, for which he had not been paid. That and that only was the issue, and that and that only should have been discussed in argument to the jury.

It is not meant by this, as appears from what has already been said, that in such arguments the conduct of the parties in connection with the transaction may not be commented upon and criticized with such severity as would seem to counsel to be just, but to make a statement which is clearly calculated to prejudice the jury against the defendant on a matter wholly unconnected with the case, and which by no possibility could have any bearing upon it, is reprehensible and, as we hold, amounts to misconduct, justifying a reversal of the judgment.

We had occasion recently in a case in Summit county to reverse a judgment for similar misconduct on the part of counsel for the plaintiff. In that case the offending attorney was a man of large experience, both at the bar and on the bench. It was a case like this one, in that there was such a conflict in the evidence as that upon the evidence alone the jury *might* have gone either way, without justifying a reversal of such judgment, as being clearly against the weight of the evidence. In such case, it is especially censurable to use language calculated to prejudice the jury against a party in the case in a matter wholly outside of any issue in the case. We do not take it upon us to say whether the court, when this offensive language was used, might not have taken such course as would prevent a reversal on the ground of this misconduct; but for some reason, which we are unable to understand, the court being appealed to, declined to take any action, and apparently gave the jury to understand that there was nothing censurable about this language, but said to counsel for the plaintiff, "Go on with your argument."

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For the reasons indicated the judgment against Hedwig Urbanowicz is reversed, as clearly against the weight of the evidence, and the judgment against John Urbanowicz is reversed because of misconduct on the part of the counsel for plaintiff.

**WORKMAN PLACING MACHINERY IN MINE KILLED BY
GAS EXPLOSION.**

Circuit Court of Cuyahoga County.

THE WELLMAN, SEAVER, MORGAN COMPANY v. CORA P. WOOD, AS
ADMINISTRATRIX OF THE ESTATE OF JERRY L.
WOOD, DECEASED.

Decided, December 19, 1910.

Master and Servant—Negligence—Duty as to Place of Work Under Control of Another—Assumption of Risk.

1. The rule that an employer is bound to exercise ordinary care to furnish his employee a safe place to work, does not apply when the place is wholly under the control of another.
2. Though the employer knew that such place under the control of another was not a safe place to work, or by the exercise of ordinary care might have known it, under the rule stated in the Norman case the employee can not recover if he also knew the same thing, or, by the exercise of ordinary care, might have known it.

Hoyt, Dustin, Kelley, McKeehan & Andrews, for plaintiff in error.

William Howell and *N. Sheldon*, contra.

MARVIN, J.; WINCH, J., and HENRY, J., concur.

The defendant in error brought suit against the plaintiff in error and the Zeigler Coal Company, seeking to recover damages for the death of Jerry L. Wood, which occurred at the mines of said coal company in Illinois on the 3d day of April, 1905. No service of summons was had upon the coal company, and so the case was tried between the defendant in error, as plaintiff, and the plaintiff in error, as defendant; the result being a verdict

in favor of the defendant in error. The following facts are shown in the case:

The decedent was killed by a gas explosion at the mines of the Zeigler Company in Illinois on the 3d day of April, 1905; he was an employee of the plaintiff in error; his home was in Ohio, and the plaintiff in error is an Ohio corporation engaged in the manufacturing and placing of heavy machinery and engines. In December, 1904, the plaintiff in error, hereinafter spoken of as the defendant, because it was the defendant below, sent a party of workmen, under the superintendence of one Keown, to put in certain machinery at the mines of the said coal company in Illinois. The decedent, Jerry L. Wood, was one of this party of workmen, and from the time that Keown took the workmen there up to the time of the death of the decedent, he continued in this employment engaged in the work of putting in the machinery at the mines. Coal mining operations were in progress at the mines during all the time that this work was going on. The coal was mined in chambers many feet below the surface of the earth. The miners and others having work to do in the mines were conveyed on a hoist or elevator down a shaft leading from the surface to these chambers, and the employees of the defendant were required to go by this same elevator down the shaft to the chambers. The explosion, resulting in the death of the decedent, occurred, as already said, on the 3d day of April, 1905, which was Monday, and the explosion took place in the morning, just as the workmen, including the decedent, had got on to the elevator platform to go into the shaft, and they were, therefore, at the mouth of the shaft. This explosion was terrific and resulted not only in the death of the decedent, but in the death and injury to still others and the destruction of the elevator platform. The ground upon which the defendant in error, hereinafter spoken of as the plaintiff, claims to recover is, that this explosion was the direct result of negligence on the part of the defendant. It should be said that the plaintiff is the duly appointed, qualified and acting administrator of the estate of the decedent, who left a widow and a child only about fifteen months old at the time of his death. The result of the trial was a verdict and judgment in favor of the plaintiff.

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By proper proceedings the case is here for review upon errors claimed by the defendant to have been committed to its prejudice on the trial, including error in overruling the motion for a new trial which was made after the verdict; one of the grounds of which motion was that the verdict was not sustained by the evidence. Among the errors complained of is that the court erred in admitting certain evidence offered by the plaintiff over the objection of the defendant. These have been examined, and the conclusion reached that there was no error in the admission of such evidence to the prejudice of the defendant. Evidence was introduced tending to show that in this mine gases generated, or at least existed, necessitating the ventilation of the mine by the use of a power fan forcing air into the chambers of the mine through a shaft constructed for that purpose, and that such a fan was used by the coal company for that purpose. That such fan was not operated on the Sunday, the day preceding *the* injury. A witness by the name of C. E. Childers, testified on the part of the plaintiff in a deposition, as also did a witness by the name of Edward Evans. Each of these men had worked at this mine a considerable time before the explosion complained of in this action. Each had discontinued work at this mine some eight or nine months before the explosion. Each was asked as to the condition of the mine in regard to gases and the means of ventilation employed at the mine at the time he worked there, and each was permitted to answer. It is said on the part of the defendant, that the time when these witnesses knew and could testify as to the condition of the mine was too remote from the time when the explosion occurred. We are of opinion that it was admissible to show the condition of the mine at the time these men were employed there, as tending to show that it was a dangerous place, when the use of the fan for ventilation was omitted, and the fact that gases existed in this mine. True, it was a good while before the explosion that they knew of this situation. But, if by the operation of the laws of nature gases were generated in the mine and existed there in dangerous quantities at the time these men worked here, it might have a legitimate tendency to show that such gases were generated in the mine at the time of this explosion. The weight to be given to

this evidence was a question for the jury, and so, as already said, we do not find that the court erred in any ruling upon evidence to the prejudice of the defendant.

The plaintiff claims that one of the duties, devolving upon the defendant, in sending the decedent and others to work at this mine was that it should furnish a safe place for its employees to work. The rule which puts this duty ordinarily upon an employer is different when the employee is put to work in a place wholly under the control of the employer, than when the employee is put to work in a place under the control of another; or rather, when the employee is put to work by his employer to do work in the premises of another, which are under the control of such other. This is pointed out in numerous cases to which attention is called in brief of the defendant, such as the case of *Homer Shadel v. Illuminating Co.*, 22 C. C. Rep., 49, and authorities noted in that opinion. Among other things this court said in that case, the following:

“There is a difference in the obligation of the employer in the matter of furnishing a suitable place for the employee to work where the work is to be done upon the premises of a third party, and where it is to be done in the shop or factory of the employer.”

In the case of *Sharpley v. Wright*, 205 Pa. State, 253, it is said:

“It is well settled that an employer is not responsible for an injury sustained by his employee, caused solely by unsafe premises which are owned and controlled by a third person, and where the latter's services are performed. The reason of the rule is that the employer does not use, own or control the premises, and hence is without power to make any change in their condition.”

In the case of *Hughes v. Malden & Melrose Gaslight Co.*, 168 Mass., 395, it is said:

“The principle underlying this and like decisions is, that the employer can not be justly charged with negligence as to matters over which he has no control.”

See also *Channon v. The Sanford Company*. 70 Conn., 573. In that case it is said:

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“If an employer sends his servant to a distant place by rail to do a piece of work on the premises of B, it would hardly be contended in the absence of a special agreement to that effect that the master would be responsible to the servant for the negligence of the transportation company in failing to carry the servant safely, or for the negligence of B in failing to keep his premises in a reasonably safe condition. In the case supposed the servant, both while being carried and while at work on B's premises, is at work for his master and the railroad car and the premises of B are places where he is directed to and does perform work for his master; and yet the master, as master merely, would be under no duty to use reasonable care to make such places reasonably safe. The law in such cases reads no such duty into the contract of hiring.”

To the same effect is the case of *Long, Administrator, v. Stephenson Co.*, 73 New Jersey Law, 186; *Hyde v. Booth*, 188 Mass., 290, and *Connelly v. Faith*, 190 Pa. St., 553.

But, it is said, that notwithstanding this modification of the rule as to the duty of furnishing a safe place for the employee, the master is responsible if he sends his employee to do work in a place which the master knows to be unsafe, or by the exercise of reasonable care should know to be unsafe; and it is said in this case that Keown, the superintendent for the defendant on the work being done at this mine, knew (and hence defendant knew) that it was unsafe to work at this mine when the fan for ventilation was not in operation.

An examination of the record shows that Keown and Wood each knew that this fan was used for ventilating this mine, and each had equal means of knowing the length of time that the fan had been idle. It shows, too, that each had equal means of knowing that there was gas in the mine, for they had together been in the mine or rather the chambers where the mining was done, and so far as appears Keown had never made such a visit to the chambers of the mine except on an occasion when he was accompanied by Wood.

The statute of the state of Illinois was introduced in evidence to show that by law it was required that the mine be inspected from day to day, and a report of such inspection be kept at a convenient place for examination; the place being designated

in the statute; and that these reports, had they been examined, would have shown that the inspection had been neglected for a few days preceding this explosion. But certainly Wood had the same means of knowing what the laws of Illinois were that Keown had. He had the same means of knowing where these inspection reports could be seen. He knew, too, from the fact that on the morning of the explosion he walked with Keown from their boarding house (and they both lived at the same boarding house) to the top of the elevator shaft where the injury happened, whether any inspection had been made by Keown or a report as to this inspection.

We think and hold that the evidence fails to show that Wood had not the same means of knowing of the dangers connected with this explosion that Keown had, and so under the rule announced in *Coal Co. v. Norman*, 49 Ohio St., 598, the verdict was not sustained by sufficient evidence.

In that case the court quotes, with approval, Section 414 of *Wood on the Law of Master and Servant*, where it is said:

“The servant in order to recover for defects in the appliances of the business is called upon to establish that the servant did not know of the defect, and had not equal means of knowing with the master.”

Whether this be a harsh rule or not, is not a question for us to determine. It has been determined by a court higher than this court, whose decisions this court is bound to follow.

For the same reason that the verdict was not sustained by the evidence, the charge was misleading where the court said (speaking of the decedent):

“If he knew of the existence of the danger which caused his death and proceeded to encounter it, it would be a risk assumed by him, and his representative could not recover unless he had notified his superior, and had encountered the danger relying on the promise to remove it by his employer.”

And again where the court said:

“If you find that the company’s foreman was negligent and that the deceased was without knowledge of that negligence, nor of the danger to which he was exposing himself, that he would

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not have met his death but for that negligence, then under the statute, the decedent's representative, the plaintiff administratrix, would be entitled to recover."

The first proposition, above quoted, states a proposition of law which is true, to-wit, that if the decedent knew of the danger the plaintiff could not recover, but it implied that unless he knew, even though he had equal means of knowing with the defendant, still there might be a recovery.

In the last proposition quoted, he distinctly says there may be a recovery, if the decedent did not know.

Both of these propositions should have been qualified with the statement that such recovery was conditioned further upon the proposition that the decedent had not equal means with the defendant of knowing of the danger.

For the reasons pointed out, to-wit, error in the charge as noted, and error in overruling the motion for a new trial on the ground that the verdict was not sustained by sufficient evidence, the case is reversed and remanded to the court of common pleas.

AGREEMENT TO CONVEY PROPERTY BY WILL.

Circuit Court of Monroe County.

LEWIS BOLTZ V. EMMA ELIZABETH RILEY ET AL.

Decided, April Term, 1912.

Wills—Agreement to Dispose of Land by Will—What the Instrument Creating the Power Must Contain.

1. A power to dispose of lands by will must be executed with the same formalities as are necessary in a deed directly conveying the land.
2. The instrument creating the power must contain a sufficient definite identification of the lands to be disposed of.

Matz & Kremer, for plaintiff.

Lynch & Luych, for Ann Elizabeth Riley et al.

POLLOCK, J.; NORRIS, J., and METCALF, J., concurring.

Heard on appeal.

The plaintiff in his petition alleges that he is the owner in fee simple and in actual possession of a certain tract of land in this county, which is described therein in four tracts, containing in all 160 acres. He further says that the defendants claim some interest or estate in said premises adverse to the rights of plaintiff which claim of the defendants is unfounded, but is a cloud upon plaintiff's title, and he asks that his title to said premises be quieted against any claims of the defendants.

To this petition, the defendant, Emma Elizabeth Riley, filed an answer, in which she claims that she is the owner in fee of the undivided one-ninth part of the first three tracts described in the petition, containing 120 acres, and she asks that she may be protected in her rights and her title quieted to the undivided one-ninth part of these premises, and for all other relief that may be just and equitable. A reply was filed by the plaintiff denying the interest of the defendant, Emma Elizabeth Riley, in said premises.

The facts in this case show that Mary Ann Boltz, the wife of Lewis Boltz, was a daughter of Rudolph Zesiger, and that the defendant, Emma Elizabeth Riley, is a daughter of the plaintiff and Mary Ann Boltz.

In 1868 plaintiff purchased the first three tracts described in the petition for a consideration of \$3,500; that at the time he borrowed from Rudolph Zesiger \$800, giving his promissory note therefor, which money was used in making the first payment on this property; that on May 18th, 1871, a calculation of the interest on this note and another note for \$800 held by Zesiger against the plaintiff was had, and the difference between the amounts due on these notes and \$2,000 was given by Zesiger to Boltz, and the notes were surrendered to him, and then plaintiff and his wife gave to Zesiger the following written receipt and agreement:

“Received of Rudolph Zesiger, \$2,000, with which we purchased land in the name of Lewis Boltz, which we agree is in full of our interest in the estate of said Zesiger in our individual or collective capacity, and which we agree shall be disposed of according to the last will and testament of said Rudolph Zesiger.

“LEWIS BOLTZ,

“MARY A. BOLTZ.

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“Witnesses:

“MARK WILLIAMS,

“JACOB WALTERS.

“May 18th, 1871.”

On September 21st, 1871, Rudolph Zesiger made his will, which after his death was admitted to probate by the probate court of this county. The seventh item of said will is as follows:

“My daughter, Mary Ann, who is intermarried with one Lewis Boltz, has been by me fully paid to the amount of \$2,000 in cash with which the said Lewis Boltz purchased a tract of land in his own name. My will is that at the death of my said daughter, Mary Ann, the lands so purchased with my said funds descend to the heirs of my said daughter, Mary Ann Boltz, according to the agreement and receipt given me by said Boltz and wife, Mary Ann.”

Prior to the bringing of this action Mary Ann Boltz had deceased, leaving nine children, of which Emma Elizabeth Riley was one.

If the defendant, Emma Elizabeth Riley, can maintain her claim to being the owner of the one-ninth interest in the premises in dispute, it must be by virtue of the power conferred on Rudolph Zesiger by the written agreement to convey this property by will. If this paper writing, for any reason, is not sufficient for that purpose, then it follows that the subsequent devise by him must fail. This brings us to the question whether the power to dispose of real estate must be created by an instrument which would itself be sufficient to dispose of such property. Objection is made to this instrument for the reason that it is not acknowledged by Lewis and Mary Ann Boltz as the laws of this state require instruments to be, which are designed to convey the title to real estate.

Clark v. Graham, 6th Wheat, 577, first and second sections of the syllabus, announces this principle:

“1. A power to convey lands must possess the same requisites, and observe the same solemnities, as are necessary in a deed directly conveying the land.

“2. A title to land can only be acquired and lost according to the laws of the state in which they are situate.”

The second paragraph only affirms the rule announced by the same court in the case of *United States v. Crossly*, 7th Cranch, 114.

Justice Marshall, in the opinion in *Johnson v. Yates*, 9th Dana, 500 (Ky.), uses this language:

“It is a familiar principle applicable to the execution of powers, that the estate can not pass by appointment under the power, unless it could have been passed by the deed or instrument creating the power, and that the appointment operates as if it had been inserted in the original deed.”

In 31st Cyc., 1043, referring to the above cases as authority, it is said:

“A power to dispose of property must be created by an instrument which would itself be sufficient to dispose of such property.”

Indeed it would seem to be self-evident that one can not confer upon another power to convey his property except by an instrument executed with all the solemnities that would be required if he himself conveyed the property. The only way that the owner can transfer the title to his real property in this state, to another, is by a written instrument executed according to the statute providing for the execution of deeds, or by will. No one claims that the instrument which defendant claims empowered Zesiger to dispose of this property was intended as a will, and at the time this instrument was executed the statute of this state required, as it does now, that all deeds, mortgages, or leases, of an estate or interest in real estate, be signed by the grantor and acknowledged before a proper officer. The instrument conferring the power on Zesiger to will this property does not contain an acknowledgment as required by the laws of this state, and for this reason the devise by him to defendant must fail.

Again, the objection is made that the instrument contains no description of the property which is the subject of the power. The only reference in the written memoranda to the property which should be disposed of according to the will of Zesiger is as follows: “Received of Rudolph Zesiger \$2,000, with which

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we purchased land in the name of Lewis Boltz.” • • • It follows that this writing does not describe any real estate, but that it will require oral testimony to supply the description of the property intended by the parties to be the subject-matter of this agreement. The Supreme Court of this state has said:

“The memorandum in writing which is required by the statute of frauds (Section 4199, Revised Statutes) is a memorandum of the agreement between the parties, and it is not sufficient unless it contains the essential terms of the agreement expressed with such clearness and certainty that they may be understood from the memorandum itself, or some other writing to which it refers without the necessity of resorting to parole proof.”

“To make a valid contract to leave an estate including real property to another by will, it is not only necessary that the contract or memorandum thereof shall be in writing, signed for the purpose of giving it authenticity as an agreement, but the terms of the agreement must be expressed with reasonable certainty in the writing, and it must contain a sufficient definite identification of the property to be disposed of.” *Kling, Admr., v. Bordner*, 65th O. S., 86.

If the contract agreeing to convey one's own property by will to another in order to be valid must contain a definite identification of the property, then certainly a contract conferring the power to dispose of another's real estate by will must contain a like identification.

Again, in the opinion in the case of *McConnell v. Brillhart*, 17th Illinois, 354, the court say:

“The writings, notes or memoranda shall contain on their face, or by reference to others that are traceable, the names of the parties, vendor and vendee, a sufficient, clear and explicit description of the thing, interest, or property, as will be capable of identification and separation from all other of like kind.”

Applying this rule to the present case, what do we find? The property for which the defendant claims the memorandum calls, was purchased by Lewis Boltz for \$3,500, and the testimony shows that of the money referred to by this memorandum, only \$800 was used in the purchase of this property. No better illustration of the wisdom of the rule that the written

memorandum must contain a definite description of the property and not be left to the uncertainty of oral testimony could be found. The same objection would prevail in permitting oral testimony to be used to supply the material part of a written contract, that there is to permit an entire conveyance of real estate to be supplied by oral testimony, where a written one is wanting.

The writing "must contain such words as will enable the court without danger of mistake, to declare the meaning of the parties; it must obviate the necessity of going to oral testimony and relying on treacherous memory, as to what the contract was." *Kling v. Bordner, supra*, page 99.

Oral testimony may be received to apply or identify a description in a written contract, but it would be a violation of the statute to permit it to be used to supply the description. In the written memorandum upon which the defendant relies, no description of the property is attempted. It says, "with which we purchased lands * * * and which we agree shall be disposed of according to the last will." This writing furnishes no description of the property which was the subject-matter of the agreement, and oral testimony must be used to supply the description of the property intended.

We think for either of these reasons the defendant has failed to sustain her action.

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**INJURY TO DRIVER WHOSE HORSE SHIED AT APPROACHING
AUTOMOBILE.**

Circuit Court of Cuyahoga County.

F. H. KRAMER v. GEORGE BLAKE.

Decided, December 19, 1910.

*Negligence—Charging Contributory Negligence Where Answer Alleges
Plaintiff Was Negligent—Charge as to Inevitable Accident.*

1. In a personal injury damage case, where the answer of the defendant contains not only a denial of negligence on his part, but also alleges that the plaintiff was injured either by reason of an inevitable accident, or by his own negligence, it is not error for the court to charge the jury with regard to contributory negligence. *Traction Co. v. Forrest*, 73 O. S., 1, and *Traction Co. v. Stevens, Admr.*, 75 O. S., 171, distinguished.
2. No specific request being made thereto, it is not error to neglect to say to the jury that the plaintiff can not recover in case his injury was received as the result of an inevitable accident, though the answer alleges such to be the fact and there was some evidence tending to establish it, if the court distinctly charges the jury that there can be no recovery unless the evidence shows that the defendant was negligent and that his negligence, proximately caused the injury.

MARVIN, J.; WINCH, J., and HENRY, J., concur.

Blake was plaintiff below and Kramer the defendant, and though the parties are here reversed they will be spoken of as they stood in the case below.

On the 30th of May, 1908, the defendant was operating an automobile upon the public highway in Springfield township, Erie county, Pennsylvania. At the same time the plaintiff was driving a horse hitched to a wagon, upon the same highway. This was a much traveled road. The vehicles, in which were these two parties, met at a place in this highway; the automobile going southerly and the horse and wagon northerly. The place of meeting was in a hollow, between a slight elevation of the road to the north, and another slight elevation to the south from such hollow; at the eastern side of the road, the side on which

the plaintiff was driving, there was immediately at the east of the traveled road a steep declivity of eighteen or twenty inches. At the place where the two vehicles passed one another the road was wide enough so that by careful driving on the part of both they could have passed without a collision. Indeed, there was sufficient room to the east of the easternmost part of the automobile, at the place of meeting, so that the wagon of the plaintiff could have passed the automobile without a collision. As a matter of fact, the horse of the plaintiff was turned so far to the right at the point where the vehicles met as that the wagon overturned and the plaintiff was severely injured.

Suit was brought by the plaintiff charging that his injuries were the direct result of the negligence of the defendant; that defendant was driving his automobile at a terrific rate of speed, and a speed that was greater than was reasonable and proper; that he came down in the valley from the hill at such speed toward the plaintiff that the plaintiff's horse frightened and turned to the right, resulting in the accident. The plaintiff further alleges that when he saw the automobile approaching him, he raised his hand to indicate to the defendant that he, the plaintiff, was in danger from the automobile, and that this warning was wholly unheeded by the defendant, but that he came on without slackening his speed at all, thus forcing the plaintiff over the declivity.

The result of the trial was a verdict and judgment for the plaintiff. After the verdict, a motion for a new trial was filed, alleging as ground for such new trial, among other things, that the verdict was not sustained by the evidence.

The evidence tended to show that the automobile was going at a very high rate of speed at the time it came in sight of the plaintiff from the top of the elevation at the north and that it continued at such very high rate of speed until it had passed the plaintiff; that the horse of the plaintiff, though a quiet horse, was somewhat frightened at the approach of the automobile, and that the plaintiff was also frightened at its approach.

On the part of the defendant evidence was introduced tending to show that the speed of the automobile was not high, but with the several witnesses produced on the part of the plaintiff

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as to such speed, against the testimony of witnesses on the part of the defendant as to such speed, we would not be justified in reaching the conclusion that the jury was manifestly wrong in believing the witnesses for the plaintiff that the speed was very high, up to twenty-five or thirty-five miles an hour. True, one witness on the part of the defendant testified that the speed was slackened as it went down the hill, the language used by her being: "We gradually got slower as we went down the hill; it was a gradual descent and we went down about five miles an hour." Then she was asked, how do you know you got down to five miles an hour, and she answered: "We looked at the speedometer. I thought that the machine had stopped, it was going at the rate of five miles an hour when we passed him." It is not surprising that the jury should have regarded this testimony as being wholly mistaken. First, it is inconceivable that one riding in a vehicle at the rate of five miles an hour should have supposed that it was standing still until she looked at a device for indicating whether it was moving or not, and found it to be moving at the rate of five miles an hour. The only possible way of accounting for this is either that the witness was somewhat excited by the accident and its surroundings or somewhat confused at the time she gave her evidence, and so did not quite understand what she said, or that the automobile in which she was riding with the defendant had been traveling at such an excessive speed that when it got down to five miles an hour she thought it was not going at all.

The defendant testifies that he did not slacken his speed after he saw the situation of the plaintiff, but he says that he was not going at an excessive speed, and he says that he did not see the plaintiff raise a hand as a warning. The plaintiff and a number of other witnesses say that the hand was so raised, and so the most natural explanation of the fact that the defendant did not see it would seem to be that as he was driving at such speed that he did not notice what the plaintiff was doing. In short, from the evidence in the case, it is not surprising that the jury reached the conclusion that the defendant was driving at a high rate of speed, without giving due care to the danger which might result to the plaintiff from continuing at that high rate of speed,

and yet he says he did not slacken his speed any, but only explains that by saying that he was going at a slow rate all the time.

If the defendant was driving at a speed of twenty-five miles or more per hour, with the surroundings as they are shown to be here, whether such rate was in violation of a statute or not, the jury might well reach the conclusion that it was a reckless and careless way of driving; that it injured the plaintiff, either because his horse was so scared that it turned out and upset the wagon, or else that the plaintiff, in the fear which might well be excited in his mind by seeing the machine coming at such a rate of speed, did not estimate with exactness how near to the automobile the defendant was driving at a reckless rate of speed, calculated to scare people or horses who might be apt to meet him. If the plaintiff in view of the surroundings exercised such care as one so situated might ordinarily be expected to use, then he would not be precluded from a recovery, even though, if he had calculated exactly the distance between the easternmost line of the automobile and the declivity over which his machine went, he would have known that he could avoid a collision without going over this declivity.

The jury probably wondered somewhat how one could drive an automobile 100 miles, or thereabouts, in less than four hours, without driving most of the way at an excessive rate of speed; the maximum rate allowed by law being twenty miles, both in Ohio and Pennsylvania. The statute of Pennsylvania was introduced in evidence.

The court did not err in refusing to sustain a motion for a new trial on the ground that the verdict was not sustained by the evidence.

But, it is urged, that the court erred in excluding certain evidence offered by the defendant. When the defendant was himself upon the stand, he was asked this question: "You may tell the jury and the court, if you can, at what rate of speed you were going when you were going down the hill just north of where this accident occurred; at what rate of speed you went further down past Mr. Blake?" This was objected to, and the court then said: "Cross-examine as to his means of knowing be-

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fore he answers." Thereupon counsel for the plaintiff examined the witness, as follows:

"Q. Mr. Kramer, anything you may say would be an estimate; you do not know the speed you were going, do you? A. Certainly.

"Q. How do you know it? A. From the way I was driving.

"Q. From the way you car ran? A. Yes, sir.

"Q. You did not look at your speedometer? A. I do not say positively I did at that time."

Whereupon the court said the objection is sustained. We think this was clearly erroneous. The witness said he could say how fast he was going although he could not say he looked at the speedometer. But he said he was accustomed to riding and driving an automobile. Surely one accustomed to driving a horse may say at what rate he was driving, though it would be an estimate, not determined by some exact means of measuring that he had, such as a speedometer. The fact that the witness had a speedometer before him and that he was not looking at it, did not disqualify him from stating the rate at which the machine was going when he says he knew that rate, even though he did not look at the speedometer. On cross-examination it would have developed that it was an estimate, but so is it ordinarily with evidence as to the speed of a railroad train, or the speed at which horses are going. However, since there is no statement as to what it was expected the witness would answer, there can be no reversal because of this error for, for all that appears, the witness might have answered in such wise as to help the plaintiff instead of himself. For all that appears by this evidence, he might have answered: "I was driving at thirty-five miles an hour." In order to take advantage of the erroneous ruling made by the court, an offer should have been made or statement of what it was expected the witness would answer, and if it turned out that it would be to his advantage, and the court excluded it, there might be a reversal by reason of such action of the court, but not as the record here stands.

Without stopping to read what follows in connection with this same matter, it is sufficient to say that the court, after further statement on the part of the witness, that he had driven an

automobile for seven or eight years, and that he had had lots of experience, and was able to judge of the speed, the court still sustained the objection to his answer. We think the action of the court was, as already stated, erroneous. The court seems to have been of the opinion. that unless one could fix exactly the speed at which he was going, he could not answer this question. For the court said, among other things "I say that it is not a matter of opinion evidence; it must be stated as a fact." However, there is another reason why this action of the court would not justify a reversal, and that is. immediately following this, the witness was permitted to answer the question: "You may state to the court and jury whether you were going at a rapid or slow rate of speed." He answered:

"I was going slow.

"How were you going in that respect when you came to Mr. Blake?

"Going very slow."

No objection to either of the questions and the answers given by the defendant was made, and the defendant had all the benefit that he could have expected from any answers he could have given to the questions which were erroneously excluded.

Error is further claimed by reason of the charge of the court. It should be said in this connection, that the answer admitted that the two vehicles met in the place stated in the petition, and that the plaintiff received an injury, such as he says he did, but denies all negligence on the part of the defendant, and then the answer says: "That any accident or injury which plaintiff might have suffered at the time and place in said petition set forth, was the result of inevitable accident or the carelessness and negligence of the said plaintiff."

It is urged that this answer did not set up contributory negligence on the part of the plaintiff, and therefore, that the charge of the court on what would constitute contributory negligence was erroneous; that since the plaintiff said that he was not in any wise negligent and said that the defendant was negligent, that nothing should have been said on the matter of contributory negligence; that that brings into the case an issue not made by the pleadings.

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What the court said on the matter of contributory negligence was this:

“It will be for you to say, from the evidence, whether or not the defendant was negligent, as charged, or whether or not the plaintiff was negligent; that his negligence contributed to the injury. The important question to be decided by you in this case is, whose negligence, if it is anyone's, was the proximate cause of the injuries sustained by the plaintiff. Was it the negligence of the defendant or the negligence of the plaintiff that caused the injuries directly?”

As to this the argument is made that not only did the court err in calling attention to the matter of contributory negligence, but also that there was error in not calling attention to the question of whether this was an accident brought about without negligence on the part of either party. As to matter of unavoidable or inevitable accident, for the moment we omit to discuss it until we have further called attention to what was said about contributory negligence. The court also said, in its charge:

“Notwithstanding any negligence of the defendant, if the jury should find that the plaintiff was in fact negligent, the plaintiff can not recover, for he himself is guilty of contributory negligence, as it is called, which contributory negligence was the proximate cause or direct cause of the injuries he received at that time and place.”

Up to this point it seems impossible to discover any possible error to the prejudice of the defendant. The plaintiff asks the jury to determine, if they found there was negligence on the part of the defendant, whether the plaintiff was not also negligent, and if so, says to them that a recovery on his behalf would be barred. Suppose that is not true. Suppose that it is not law. Suppose that the plaintiff was being barred of a recovery here which under the pleadings would not bar a recovery. Can the defendant be heard to complain about it? But further and immediately following what was last above quoted, the court said:

“The burden of proving contributory negligence on the part of the plaintiff rests on the defendant, with this qualification, however, that if the testimony introduced by the plaintiff as

to the circumstances under which these injuries were received fairly raises a presumption in your minds, that the plaintiff himself was guilty of contributory negligence, then the burden is upon the plaintiff to remove that presumption.”

Surely if the word “contributory” had been omitted from this language and the court had said the burden of proving negligence rests upon the defendant except where the plaintiff’s evidence tends to raise a presumption of his negligence, the defendant could not complain, and how is it possible for him to complain because the court said that the burden of proving contributory negligence was on the defendant. For, if the position taken here by the defendant is correct, contributory negligence on the part of the plaintiff, under these pleadings, would not avail the defendant at all. This seems to us wholly untenable. If the plaintiff showed that the defendant was negligent and that such negligence was the proximate cause of his injury, then the theory of the defendant here is that the plaintiff would have been entitled to recover without reference to whether he was himself negligent, because it is said that the answer did not charge the plaintiff with contributory negligence, and that, therefore, the logic of the argument is, that if there was negligence on the part of the plaintiff which only contributed to his injury, and was not the sole cause, such negligence would be no defense. Is it possible that if the plaintiff had shown under the pleadings like these that the defendant was negligent and that such negligence was a proximate cause of the injury, but it had been shown on the part of the defendant that the plaintiff’s negligence was also a proximate cause of the injury, that the plaintiff could recover? The question seems to us to answer itself under the well known rules of law.

Our attention is called to the case of *Traction Co. v. Forrest*, 73 Ohio St., page 1. In that case it is said in the syllabus:

“Where, in a suit to recover for personal injuries occasioned by the alleged negligence of the defendant, the petition, after stating the facts upon which the plaintiff bases his action, avers that the plaintiff was free from fault and the answer is a general denial, there is no issue of contributory negligence, and where, in such case, the testimony introduced by the plaintiff does not

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tend to show contributory negligence, it is error for the court to introduce the element of contributory negligence in its charge to the jury and give instructions thereon. And where it is apparent that the jury may have been misled by such charge to the prejudice of the defeated party, the judgment will be reversed and a new trial awarded."

An examination of that case shows that the defendant did not plead that the plaintiff was negligent, and so that is to be distinguished from the present case.

Attention is also called to the case of *Traction Co. v. Stephens, Administrator*, 75 Ohio St., 171. In this case the answer charged no negligence to the plaintiff, and like the case of *Traction Co. v. Forrest, supra*, the case is distinguishable from the one under consideration. We do not feel justified in extending the rule, as stated in the two cases last cited, beyond cases coming practically within the facts of those cases. We can not believe that the Supreme Court ever meant to say that where an answer was filed to a suit for damages on account of negligence, in which answer it is charged that the plaintiff was negligent, there could be a recovery where the defendant is shown to be negligent, if it turns out upon the trial that the plaintiff was also negligent, and that the negligence of each, or the combined negligence of both, proximately caused the injury.

But it is said that the court omitted to charge specially on the matter of inevitable accident. The court did distinctly charge that there could be no recovery unless the evidence showed that the defendant was negligent, and that his negligence proximately caused the injury. Certainly that language distinctly precluded any recovery if the jury should find that the injury was the result of an inevitable accident. No exception was taken at the time of the trial of the case and nothing was said on this subject, nor was any request or suggestion made to the court to charge on that subject.

The result is that we find no error in this record such as would justify a reversal and the judgment is affirmed.

EXERCISE OF EMINENT DOMAIN BY A RAILWAY COMPANY.

Circuit Court of Cuyahoga County.

**THE SCHATZINGER REALTY COMPANY V. THE CLEVELAND SHORT
LINE RAILROAD COMPANY ET AL.**

Decided, December 19, 1910.

Appropriation by Railroad Company—Petition—Articles of Incorporation as Evidence—Interest of Another Company—Belt or Terminal Railroads.

1. In appropriation proceedings by a railroad company for its original right-of-way, it is not necessary that the petition state the termini of the road, or that the parcels of land described in the petition are all the parcels within the county which are sought to be appropriated.
2. Articles and amended articles of incorporation of a railroad company are proper evidence of its incorporation and right to appropriate lands.
3. In an appropriation case brought by a railroad company it is not competent for the land owners to show that some other railroad company is interested in the appropriating company and will be benefited by the result of the proceedings.
4. A belt or terminal railroad company, duly incorporated under the laws of Ohio, may exercise the right of eminent domain.

P. G. Kassulker, for plaintiff in error.*Kline. Tolles & Morley*, contra.

MARVIN, J.; WINCH, J., and HENRY, J., concur.

The relation of the parties here is the reverse of that which they sustained to one another in the original action, which was brought in the court of insolvency. They will be designated, however, in this opinion as though the relation was as it was in such original action. Each of the parties is a corporation. The plaintiff is engaged in the construction of a railroad from a point easterly of the city of Cleveland to a point westerly of the said city. The defendant owns certain real estate through which the plaintiff seeks to construct its road. The plaintiff filed its petition in the court of insolvency, setting out that it was a

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railroad company; that it was constructing a railroad; that it was necessary for the construction of its road that certain real estate described in the petition, owned by the defendant and located in this county, should be used for the purpose of such road; that it had been unable to agree with the owner of such real estate and prayed for the appropriation of the property by proper proceedings.

It is claimed that this petition did not warrant any proceeding under it, because it failed to state such facts as authorize the proceedings to appropriate. The statute in force at the time regulating such matters was Section 6416, Revised Statutes, and reads:

“In such a case the corporation may file a petition with the probate judge, verified as in a civil action, containing a specific description of each parcel of property, interest, or right, within the county, sought to be appropriated, the work, if any, intended to be constructed thereon, the use to which its land is to be applied, the necessity for the appropriation, the name of the owner of each parcel, if known, or if not known a statement of that fact, the names of all persons having or claiming an interest, legal or equitable, in the property, so far as they can be ascertained, and a prayer for its appropriation.”

It is objected that the petition was bad because it failed to state the termini of the road; that it did not state that the parcel sought to be appropriated was the only parcel in the county which it desired to appropriate. So far as the failure to state the termini of the road is concerned, it is sufficient to say that the statute does not require that the petition shall give such termini. So far as the other question as to the property sought to be appropriated is concerned, it seems enough to say that it did describe all the property which it sought to appropriate in that proceeding, and it seems a novel proposition that it should be required to contain the negative averment that it does not desire to appropriate any other real estate in the county. It does describe all it seeks to appropriate in this proceeding, and that we hold to be sufficient.

But, it is objected, that the court of insolvency was without jurisdiction, because it is said that the act conferring such juris-

diction is in contravention of the provisions of the Constitution of the state. This is not an open question in this court, nor indeed in this state. Both this court and the Supreme Court have held that the act is constitutional and that the court has jurisdiction.

It is further urged that the court erred in admitting the articles of incorporation and the amended articles of incorporation of the plaintiff. The plaintiff was required to show that it was incorporated as a railroad company, having the authority of eminent domain; the proper way to do this was by showing its articles of incorporation and any amended articles of incorporation which had been filed with the Secretary of State and certified by him, and there was no error in admitting this evidence.

It is urged further that the evidence on the principal hearing as to the necessity of the appropriation and the failure of the plaintiff and the defendant to agree upon a compensation for the land to be used was not sufficient. This objection is not well taken. It was shown by the testimony of Mr. Hopkins that the line had been located where it would be necessary to have it. However, a sufficient answer to this proposition is that the evidence is not all in the bill of exceptions. There was presented in evidence a blue print, which is spoken of by Hopkins and other witnesses, and it is said shows the line of the road. The bill of exceptions says that such blue print is attached to the bill marked "Exhibit B" and made a part of such bill, and there is no such blue print with the bill, and we are therefore left without that evidence on which the court acted in determining the question of the necessity for the appropriation and the failure to agree with the owner, and this failure of the bill to give us all the evidence disposes of the whole question of our passing upon this case upon the weight of the evidence. We can not do it, because we have not all the evidence.

But it is said that there was error on the part of the court of insolvency in refusing to permit evidence to show that the Lake Shore & Michigan Southern Railway Company was interested in this railroad and was the real party in interest. It is

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enough on this point to say that this railroad company, the plaintiff in this action, was under the laws of Ohio authorized to appropriate lands necessary for the construction and operation of its road. If it had any contract with another company which would make it unlawful for it to operate its road after it was constructed, that right could be tested in a proper case. Not only that, but if this railroad company had obtained its franchise for any unlawful purpose, a proceeding in *quo warranto* would have been the proper action in which to determine that question. It would have been erroneous for the court to have admitted evidence showing what it was sought to be shown, that there was a contract as to the use of this road between the plaintiff and the Lake Shore & Michigan Southern Railway Company. The articles of incorporation of the plaintiff, as already said, established that it was a corporation organized under the laws of Ohio pertaining to the incorporation of railroad companies, and the law authorizes such a company to exercise the right of eminent domain; therefore, it would have been incompetent for the court of insolvency to have held that it had not such right because of some contract it had made with somebody else. However, the court did allow a cross-examination of Mr. Hopkins, an officer of the plaintiff, to a very considerable extent, in which it appeared that no such contract existed as could by any possibility have interfered with the rights of the plaintiff in the matter of this appropriation. Our statute, Section 3300, authorizes one company to aid another in the construction of its road, by means of subscription to its capital stock, or otherwise, for the purpose of forming a connection of the roads of the companies, if the road of the company so aided will not when constructed form a competing line. There was no evidence here tending to show that this road, when constructed, would be a competing line with the Lake Shore & Michigan Southern Railway Company. The real claim on the part of the defendant was and is that because this proposed road would connect at each terminus with the track of the Lake Shore & Michigan Southern Railway Company, it was really an adjunct of such company, and that for some reason that deprived it of its right of eminent domain.

We think this is completely answered by the case of *State v. T. & R. T. Railroad Co.*, 24th C. C., 321. That was an action in *quo warranto*, asking to prevent the railway company from appropriating a right-of-way upon which it proposed to construct a track to connect its main line with certain industries, and it was held that the company had a right to make such appropriation.

In the case of *State, ex rel, v. Martin*, 51 Kas., 468 (33 Pac., 9), it is held that under the general law providing for the incorporation of railroad companies, a circular or terminal railroad might be projected and constructed for the purpose of switching cars from one part of the city to the other, and of affording terminal facilities to other railroad companies, and that a company organized for that purpose might exercise the power of eminent domain. And in a note to *Bridwell v. Gate City Terminal Company*, reported in the 10th L. R. A. (New Series), at page 909, this language is used:

“It is a well-settled fact and principle of law, and one supported by all the decisions that can be found, that belt or terminal railway companies and union passenger station companies, that is, companies organized for the purpose of furnishing connecting terminal and depot facilities to other railroad companies, are companies organized for a public use, and are lawfully entitled to exercise the power of eminent domain.”

The result reached in the court of insolvency was that the land sought to be appropriated was necessary for the construction and operation of the road; that the defendant had failed to agree upon the compensation therefor, and then a jury was impaneled for the purpose of having the damages assessed.

Upon proceedings in error being prosecuted to the court of common pleas, this judgment of the court of insolvency was affirmed, and the present proceeding brought to reverse the judgment of the court of common pleas in so affirming the judgment of the court of insolvency, is here affirmed.

EXAMINATION OF EXPERT WITNESSES IN WILL CONTEST.

Circuit Court of Cuyahoga County.

**MICHAEL J. WALSH, EXECUTOR OF THE WILL OF JOHN WALSH,
DECEASED, ET AL V. JAMES A. WALSH.**

Decided, December 30, 1910.

*Contest of Will—Cross-Examination of Experts—Evidence of Experts—
Comment on Probate of Will.*

1. The rule which requires that one in putting hypothetical questions to his own expert witness must confine his hypothesis to matters upon which evidence has been introduced, does not extend in its full force to the cross-examination of such witness. In cross-examining such expert witness questions may be put based upon some other hypothesis which the cross-examiner hopes to establish by evidence.
2. An expert may not be called upon to say whether one was competent to make a particular will, but only whether, in his opinion, his mental capacity was such as the law requires for the making of a valid will.
3. In a will contest case it is misleading to charge the jury that it is of no importance what the probate judge did in probating the will, and that they are not to be influenced by what he did.

Green, Zmunt & Zmunt, for plaintiffs in error.

Estep & Gott, contra.

MARVIN, J.; WINCH, J., and HENRY, J., concur..

James A. Walsh filed his petition in the court of common pleas setting out that he, together with Michael J. Walsh and Alice Carey, were the only children and heirs at law of John Walsh, deceased; that Mary Walsh is the widow of said decedent; that said John Walsh died on the 21st day of March, 1908, and that a paper writing purporting to be his last will and testament was admitted to probate in the Probate Court of Cuyahoga County, Ohio, on the 9th day of April, 1908, and averring that the said paper writing is not the last will and testament of the said John Walsh, and praying that an issue be made up, that such paper writing may be set aside as the will of the decedent. The defendants named in the petition are Michael J. Walsh,

as executor of said purported will, Michael J. Walsh, Mary Walsh, Alice Carey, Howard J. Carey and Philip Rayner, guardian of said Mary Walsh.

Upon the trial the jury found that the paper writing was not the will of the decedent; and the parties interested in the establishment of this writing as the will of the deceased, who were made parties in the original proceeding, bring this proceeding in error to set aside the judgment of the court below, which judgment was entered, upon the finding of the jury, as already stated. It developed on the trial that the decedent was severely injured in a railroad accident in the early part of the day on which he died; that immediately after such injury he was taken to St. Alexis Hospital, where he remained until his death, about half past seven o'clock on the evening of the same day; that the purported will was drawn by Frederick Green, Esq., an attorney at law; that the decedent signed by his mark such writing; that such signature was attested by the signature of two witnesses, and this occurred about 5 o'clock in the afternoon of the day of the injury, a little more than two hours before the decedent's death.

The defendant, as required by Section 5864, Revised Statutes, offered the paper writing, purported to be a will, together with the order of probate, and rested his case. This was sufficient to make a *prima facie* case, as provided in Section 5862 of the Revised Statutes, which reads: "On the trial of such issue the order of probate shall be *prima facie* evidence of the due attestation, execution, and validity of the will or codicil." Thereupon this evidence having been offered, as already stated, the plaintiff below proceeded to introduce evidence tending to show that by reason of the injury which the decedent received on the morning of this day, and from which he died in the evening, he had not mental capacity sufficient to make a valid will.

We are asked to reverse this case on the weight of the evidence. This, we can not do. The evidence was conflicting; there was a great amount of it, both expert and other evidence, and we are not prepared to say that the jury clearly went wrong in reaching the conclusion that the writing was not the will of the decedent, because of mental incapacity on his part at the

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time of its execution. But there was error in this trial which requires a reversal. Among the witnesses called on the part of the contestors was Dr. Wm. F. Golling, who qualified as an expert, and testified as such, and in answer to hypothetical questions put to him, testified that he did not regard the decedent as competent to make a will at the time this was executed. Dr. Golling saw the decedent where he was in the hospital, after the injury and before the execution of the writing. On cross-examination he was asked a number of questions, as appears by reference to page 52 and following, up to 54, in the bill of exceptions, which he was permitted to answer. Among these, are the following:

“Q. Suppose for instance, that he (speaking of the decedent) should say that he wished his daughter to hold a particular piece of property in a certain manner during the lifetime of her husband, after the husband's death to own it absolutely, what would such directions of his indicate as to his mental condition?”

The answer was:

“That would be all right; I would think that he was able to do business as far as that goes.”

That was followed by the question “That he was possessed of sound and disposing mind and memory,” which was answered by “Yes, sir, that his memory was very good.” Another question was as follows: “Your conclusion, doctor, was based upon your observation of the patient?” And the answer was “Yes, sir.” This was followed by several questions and answers, to-wit:

“Q. And the fact that he died within several hours afterwards? A. Yes, sir.

“Q. Although it is true that persons retain control of their mental faculties somewhat up to within practically the moment of their death? Is that not true? A. But this is not sickness, disease.

“Q. But in cases of shock, I take it, from what you say? A. I don't think it would wholly come from things which you have been asking me about, that is something I can't tell. I only saw him from the time he left Bedford. I don't think he was able to make a will at the time I saw him, and he got worse and died soon after I saw him, and so far as these little

questions you have been asking me, I am not competent to answer those questions because I didn't see the man; I don't know when he made the will; I don't know anything about it."

After answering this and other questions upon cross-examination the doctor was re-examined by counsel for the contestants, and then the court said to the jury:

"Gentlemen of the jury, the doctor was permitted to answer some hypothetical questions put to him by Mr. Green and I take it from your consideration. The questions were misleading, I think, and therefore you are not to consider them."

To this action of the court counsel for the contestees excepted. The Mr. Green spoken of by the court was such counsel. This action of the court was erroneous for two reasons: One that it was indefinite as to what was taken from the jury, and it was also erroneous because the contestees had a right to an answer from this expert witness on these hypothetical questions. The writing was already in evidence. That writing purported to make bequests such as were spoken of in the hypothetical questions.

That writing was *prima facie* the act of this decedent, hence there was evidence tending to show that the decedent had done the things suggested in the hypothetical questions. But even if that were not true, the rule which requires that one in putting hypothetical questions to his own expert witness must confine his hypothesis to matters upon which evidence has been introduced, does not extend in its full force to the cross-examination of such witness. In cross-examination, questions may be put to the witness based upon some hypothesis other than that which the party producing the witness has introduced evidence tending to support. If this were not true a party might introduce evidence in chief tending to support certain propositions of fact, and then introduce an expert witness and ask him hypothetical questions based upon the facts which the previous evidence had tended to establish, and the adverse party would be left without the opportunity to know what the evidence of the witness would be upon another set of facts, which it may be that this adverse

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party hopes to establish. Such cross-examination, too, is permissible to test the witness who has been offered as an expert. Examining the bill of exceptions at page 116 we find that Dr. Thomas A. Burke, as a witness called on the part of the contestants, was being examined. He had qualified as an expert and then various hypothetical questions were put to him, and among them the following:

“Now doctor, suppose the case as I have stated it to you, and in the case I have stated to you it is claimed that about five o'clock that same afternoon this man was claimed to have made a will, substantially as follows in its material aspects. Item 2 of the will he undertook to give to his daughter, one of his daughters, during the life of her husband the place in which he then lived, situated in Bedford township, in this county, except the gas well located on the place, and another parcel of land owned by him in the village of Newburgh, consisting of ten acres of land, and then on the death of her husband he said the place in which he then resided was to go to his daughter absolutely and she was also to have the place in South Newburgh, subject to the following conditions: Should she desire to dispose of the said piece of land, his son, Michael J. Walsh, was to have the right to purchase it for the sum of \$1,000. That Michael Walsh was to have the use of the gas well on the place where John Walsh resided, and as long as he lived and if he should die leaving lawful issue, such issue shall have the use of it during their lives, then in the next item he gives to his son Michael Walsh the farm where he resided in South Newburgh, then in the next item he undertook to make a trust estate providing that all the rest of the household goods and farming implements shall be bequeathed to his son Michael in trust for the following provision: Converting all the goods into money and pay the income from \$3,000 annually to his daughter Alice Carey during the life of her husband, the income of the balance of the property to be paid to his wife during her natural life. Then he provided that on the death of her husband, he shall pay Alice Carey \$3,000. then he provided that on the death of his wife, he shall pay one-half of the balance to the son James, and retain the other half himself. Then, he provided in another item his daughter Alice was to have the use of the farm implements and stock, and should she not desire to use them, they shall be sold to the son Michael Walsh, and the proceeds become a part of the trust fund. Then, his wife was to have the household goods. Now, doctor, what do you say as to a man in the condition I have already described to you in my previous question, having a sound

and disposing mind and memory to such an extent as to enable him to make this will I have outlined to you?"

This question was objected to by counsel for the defendant and the objection overruled, and exceptions taken, and the witness answered: "I think it is covered in my previous answer. It is impossible to have a sound and disposing mind and memory; it would apply to that as well." The objection to this question should have been sustained. It assumes too much, and the answer of Dr. Burke both to this question and to the question following, showing that he understood it, and that the question involved not necessarily the capacity of the party spoken of to make a will, but that it would require, as the doctor put it, in answer on page 118 (bill of exceptions) "A wonderful mind." He says on the same page, that to make such a will as that would require a better mind than the ordinary man possesses. A remarkably clever mind. It was not necessary that the defendants should show here that the decedent was a man of extraordinary mind or that he was competent in making a given kind of will so far as mental capacity was concerned; it was sufficient for them to show that he had such a mind and memory as the law makes sufficient for the disposition of his property by will. It is not to be supposed that this man, who was an uneducated man, or than any uneducated man would be able to express in proper terms just how he would want trust estates held, and plan it all out by means of various things that he might want done with his estate in the way of being held for parties during minority, or being held for charitable purposes for a time, or the like, and for that reason, lawyers are called on to do the writing for one's will. It is true that if what they write does not express what the testator wants, it is not his will, but if he learns that the testator wants property held, as suggested in this question, that the income from a certain \$3,000 should be paid annually to a daughter during the life of her husband, the income from the balance of such property to be paid to his wife during her natural life, and that he wanted Alice Carey to have the \$3,000 if she outlived her husband, and the like, then the words to be used to carry out these various desires of the testator might be the words of the

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lawyer who might be called upon to write the will. It may very well be that the testator did not know how to use the words. It may be very well said that he did not know just how trusts may be created, and the like, and as Dr. Burke very well says, it would require a remarkably clever man to properly express all these things. But is it possible that a man of sound and disposing memory, though not a remarkably clever man, is not competent to execute a valid will because he is not able for want of education and for want of knowledge of the law to know how his wishes shall be carried out, and is thereby incompetent to make a will? We know of no authority for the proposition that an expert may be called upon to say whether one was competent to make a particular will. It is only a question of whether his mental capacity was such as the law requires for the making of a valid will, as has already been stated. The experience of the lawyers in courts justifies the saying that a will which simply provides "I give and bequeath all of my property of every kind and nature to my beloved son John," is one likely to be other than the real will of the testator, as the most complicated will that one can think of.

Again, the court erred in its charge to the jury in the use of these words (the court was speaking of the effect of the order of the probate court, the incumbent of which was Judge Hadden, admitting this will to probate) :

"So that what Judge Hadden, as probate judge, did with this will is of no importance, except that by force of the statute it became *prima facie* evidence of the due attestation, execution and validity of the will, and cast the burden upon the contestor of showing that it was invalid. Except for that, this case is heard anew, and you should not be influenced by what Judge Hadden did. Counsel may not have been present, and, if present, had no absolute right to be heard, whereas in the contest here, all parties have a full right to be heard. The proceeding here is in the nature of an appeal from the order of the probate court, and all the material facts are produced, just as if Judge Hadden had not made such an order, except as the statute directs that such an order is, *prima facie*, evidence of the will's due attestation, execution and validity, the burden being upon the contestants to invalidate it."

This language is calculated to mislead the jury, for two reasons. He has said that what Judge Hadden did is of no importance. True, he follows that by saying:

“Except by force of the statute, it became *prima facie* evidence of the due attestation, execution and validity of the will, and cast the burden on the contestor of showing that it was invalid * * * and you should not be influenced by what Judge Hadden did.”

Now that may be so analyzed as to mean that except establishing the fact that the burden of showing the invalidity of the writing as a will was upon the contestor, the order of probate was of no account, or it may be construed to mean, and was very likely so construed by the jury, that the fact that the will had been admitted to probate was not to be considered by them as establishing any proposition. The danger that it may be so understood follows from the language “and you should not be influenced by what Judge Hadden did” and then the court goes on to give the reasons why they should not be influenced by what Judge Hadden did, and states that they should be influenced to the extent that such order made by the probate judge by force of the statute established *prima facie* evidence of the due attestation, execution and validity of this writing, as a will.

For error in the rulings on evidence, and because of the misleading character of the charge, in the words pointed out, the judgment of the court of common pleas is reversed, and the cause remanded.

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SALE OF A DREDGE AND DOCK COMPANY.

Circuit Court of Cuyahoga County.

LOUIS P. SMITH v. CALEB E. GOWAN; AND MARGARET K. SMITH
v. CALEB E. GOWAN.

Decided, February 14, 1911.

Agent to Sell Can Not Exchange—Acquiescence of Principal—Corporations—Estoppel.

1. Power to an agent or trustee to sell, does not authorize him to exchange, but acquiescence therein until the other party to the exchange has changed his position and the status quo can not be re-established estops the principal from taking advantage of this lack of power.
2. Where all the stockholders in a corporation except the plaintiff have acquiesced in certain transactions, such conduct on the plaintiff's part as would estop him from maintaining an action for his own benefit, to have said transactions set aside, will estop him from maintaining such an action for the benefit of the corporation.

H. L. Peeke and E. J. Pinney, for plaintiffs.

Squire, Sanders & Dempsey, Kline, Tolles & Morley and Henderson, Quail & Siddall, contra.

MARVIN, J.; WINCH, J., and HENRY, J., concur.

Each of these cases is based on the same state of facts, and each is brought to set aside a transfer of the property of the Cleveland Dredge & Dock Company to the Great Lakes Dredge & Dock Company, each of which is a corporation, which transfer was made on or about the 30th of June, 1906. The plaintiff in each of these cases was a stockholder in the first named company; the plaintiff, Louis P. Smith, owning 48 per cent. of the stock, and the plaintiff, Margaret K. Smith, owning 1 per cent. of the stock. The balance of the stock was owned, 48 per cent. by J. A. Smith, a brother of the plaintiff, Louis P. Smith, and 1 per cent. by E. B. D. Smith, wife of said J. A. Smith, and 2 per cent. by James R. Sprankle, now deceased. Indeed, Sprankle was already dead at the time of this transfer and the 2 per cent.

of the stock which he had owned constituted a part of his estate. The Cleveland Dredge & Dock Company was the outgrowth of a partnership which had before its organization existed between the plaintiff, Louis P. Smith, and his brother, James A. Smith. The corporation having been first organized as the L. P. & J. A. Smith Company and then by re-organization changed to the Cleveland Dredge & Dock Company, the two brothers being equally interested in said partnership. When the corporation was organized, in order to make the number of shareholders sufficient to constitute a board of directors, a share of the stock which was purchased by Louis P. was issued to his wife, Margaret K., and a share of the stock purchased by James A. was issued to his wife, E. B. D., and then two shares were issued to Sprankle, who was a brother-in-law of the Smiths.

It is agreed on the trial that though each of these wives and Sprankle were genuine stockholders, they became such simply to qualify them to act as directors, so that the corporation might be legally organized. . The purchase of the stock by Louis P. and James A. Smith was made by the transfer of the property of the partnership formerly existing between them to the corporation. Manifestly the issue of the stock, as it was issued to the two wives and to Sprankle, was that the two brothers should practically control the corporation, each having an equal interest therein. In 1905, or the early part of 1906, the Cleveland Dredge & Dock Company was in financial straits. Its creditors were consulted and the result finally was that the management of its affairs was put into the hands of a committee, agreed upon between the corporation and the creditors, and spoken of as the creditors' committee. This committee undertook to tide the company over its embarrassment, believing that its assets were sufficient to pay all its debts, and much more, provided its business could be carried on and its contracts then existing and partly performed could be completed; that this and the business it was likely to get would eventually pay all the debts and leave a good surplus for the stockholders.

On the 26th of March, 1906, a contract was signed transferring the control of the affairs of the Cleveland Dredge & Dock

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Company to this committee, and in terms authorizing the committee to sell the assets of the company, if it should deem it best.

The clause of said contract authorizing the sale is in these words:

“To give to said committee, which they hereby do, full authority and discretion with respect to the management of said company and the disposition of the assets of said company by *sale, liquidation or otherwise*, in such manner and at such *price*, as they may deem just and proper, at any time during the continuance of this agreement.”

The committee made the transfer of the property to the Great Lakes Dredge & Dock Company, as already stated, on or about the 30th of June, 1906, the Great Lakes Dredge & Dock Company undertaking to complete various contracts for the kind of work which was carried on by the Cleveland Dredge & Dock Company, and which it had partly performed, and upon which there had been earned a large amount of money which had been retained as a percentage until the completion of these contracts. Of course it was of great importance to the Cleveland Dredge & Dock Company that these contracts should be completed so that this retained percentage could be realized. The transfer however made by the committee to the Great Lakes Dredge & Dock Company was not made for money, but there was taken in exchange for these assets stock of the Great Lakes Dredge & Dock Company, which stock was issued to a trustee, who still holds it.

The purpose of each of the present actions is to set aside this transfer and for an accounting on the part of the Great Lakes Dredge & Dock Company and the several members of the creditors' committee and the trustee. Without stopping to examine the terms of the contract of transfer we hold that the authority given to the committee to sell the assets of the Cleveland Dredge & Dock Company was not an authority to exchange its assets for any other property, except money or its equivalent. An authority to sell is not an authority to exchange. In support of this, attention is called to the case of *City of Cleveland v. State Bank of Ohio*, 16 Ohio St., 236. In this case the court construed these words:

“To sell said shares or any part thereof at such time or times as to them may seem expedient for not less than their par value and to do whatsoever else may seem necessary to secure and advance the interest of the city in the premises.”

Commenting on these words the court said that such words did not authorize an exchange of the shares of stock for other property.

Certainly the language here construed was as comprehensive as the words of the contract now under consideration, giving the creditors' committee “full authority and discretion with respect to the management of said company and the disposition of the assets of said company by sale, liquidation or otherwise, in such manner and at such price as they may deem just and proper.”

On the part of the defendants, however, it is urged that whatever rights the plaintiffs might have asserted, if they had acted with promptness upon learning that which had been done in the matter of this transfer, they are estopped from now asserting. As early as the 13th of July, 1906, the plaintiffs knew of this; in any event, on the 25th day of July, 1906, L. P. Smith saw the contract between the committee and the Great Lakes Dredge & Dock Company and they did nothing until the 1st day of October, 1906, when Louis P. Smith made a protest against the action which had been taken, but suits were not brought until May 21, 1907.

In the meantime the Great Lakes Dredge & Dock Company had taken possession of the assets of the Cleveland Dredge & Dock Company, which consisted of some dredges, scows and other machinery and apparatus for dredging, building docks and the like along the lakes. It had made repairs on the property, had divided it, using it with other property of the same kind which belonged to it originally, and had gone on with the completion of the contracts, which, as already stated, had been partly performed by the Cleveland Dredge & Dock Company, expending large sums of money in the completion of such work and the making of such repairs, and in short had put itself in a very different position from that in which it was with reference to these assets when it first took possession of them, and had made it

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impossible to restore the *status quo*. There seems very little doubt that except for the claim that these plaintiffs are stockholders in a corporation and that whatever they may secure by virtue of these several suits would be for the benefit of the corporation, they would each be estopped from maintaining an action. In support of this, see *The United States Rolling Stock Company v. The Atlantic & Great Western Railroad Company*, 34 Ohio State. 450, and the authorities there cited.

But it is urged that estoppel which would be effective as against these plaintiffs, were they suing simply for an infringement of a personal right, can not be asserted to the prejudice of the corporation in which they are stockholders. A complete answer to this seems to be furnished by the fact that though the corporation is a legal entity any benefit which could come to it would be a benefit simply to its stockholders; that substantially all of its stock was owned by the two Smith Brothers; that James A. Smith and his wife are content with what has been done; that so far as appears no complaint is made by the representatives of the two shares of Sprankle stock; that there is nobody but these plaintiffs who could be benefitted by anything that could come to the corporation, who is not satisfied with the situation as it is—in fact practically nobody but the plaintiff, Louis P. Smith. It would, therefore, seem equitable and just that what would estop these plaintiffs if each was suing for an individual right should estop them from maintaining these suits. In the case of *State, ex rel, v. The Standard Oil Company*, 49 Ohio St., 137, the first paragraph of the syllabus reads:

“That a corporation is a legal entity, apart from the natural persons who compose it, is a mere fiction, introduced for convenience in the transaction of its business, and of those who do business with it; but like every other fiction of the law, when urged to an intent and purpose not within its reason and policy, may be disregarded.”

Practically each of these suits is brought to vindicate what Louis P. Smith regards as an infringement of his personal right. The amount of stock held by Margaret K. Smith is too insignificant to make the result of this litigation of substantial im-

portance to her, and Louis P. Smith should be treated in this action, notwithstanding there is technically a corporation's rights sought to be vindicated, as suing for his individual benefit. So treating him, we hold that he is estopped from maintaining the action, and that which estops him estops Margaret K. Smith in her action, and the result is that the petitions are dismissed.

SALE OF LANDS OF DECEDENT TO PAY DEBTS.

Circuit Court of Cuyahoga County.

**WILLIAM B. BEEBE, ADMINISTRATOR DE BONIS NON OF THE ESTATE
OF JOHN CANDA, DECEASED, v. JOHN A. CANDA ET AL.**

Decided, February 14, 1911.

Administrator—Action to Sell Lands Fraudulently Caused to be Conveyed.

An administrator may bring his action in the common pleas court for the sale of lands to pay his decedent's debts and include in such action lands to which the decedent never held title, but for which he paid and fraudulently caused to be conveyed to another with intent to defraud his creditors.

Wm. B. Beebe, W. C. Rogers, J. W. Bowes and W. S. Kerruish,
for plaintiff in error.

Hart, Canfield & Croke and George C. Hansen, contra.

MARVIN, J.; WINCH, J., and HENRY, J., concur.

On the 12th day of September, 1907, John Canda, theretofore a resident of Cuyahoga county, Ohio, died intestate, leaving several heirs at law, all of whom are made defendants in this action. One of said heirs at law, viz, John A. Canda, who is a son of the said deceased, was appointed by the probate court of said county as administrator of said decedent's estate; later he was removed from said administration, and thereafter the plaintiff was appointed by said probate court to complete such administration.

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At the time of his death said John Canda was indebted to various persons, and there now remains unpaid, of such debts, on the aggregate of \$3,000 or more. There are no personal assets of said estate available for the payment of any part of said debts, or the costs and expenses of the administration of the decedent's estate.

Said decedent held legal title to no real estate at the time of his death, nor had he any equitable title to or interest in any real estate, which could have been maintained by him, or which can be maintained by his heirs at law.

The petition in this case describes three parcels of real estate, which it alleges were all purchased and paid for by the decedent, and by him caused to be conveyed to the parties now holding the legal title thereto. None of these parcels was conveyed by the defendant to the present holder of the legal title.

The petition further alleges that at the several times when these parcels were so purchased and paid for by the decedent he was largely in debt and that he purchased and paid for each of them, causing the title in each case to be conveyed to another, for the purpose of concealing his assets and to hinder, delay and defraud his creditors.

The legal title to one of the parcels described in the petition is now in Mabel G. Hill. As to such parcel we find no evidence that she did not pay for such parcel taking the title in good faith, and as against her the petition is dismissed.

The legal title to another parcel is in Joseph J. Ptak; this is described as being in Cleveland, Cuyahoga county, Ohio, and consisting of sub-lots 377 and 378 in J. M. Hoyt's allotment. This was conveyed to said Ptak by Barbara Canda, now deceased, who then held the legal title to said premises by devise under the will of her deceased husband, Jan Canda, who obtained his title by deed from the said decedent, John Canda; such conveyance was made for the purpose of securing payment of money loaned by said Ptak to said John Canda which said money has been paid to said Ptak, so that he makes no claim to the ownership of said premises.

The said Barbara Canda left a will, which was duly probated, by which she bequeathed her property (except her home on

Iona street, which she demises to John A. Canda and Edward Canda) to the defendant John A. Canda, so that as between the defendants Joseph J. Ptak and John A. Canda the latter is the owner of the said two lots.

The legal title to the other parcel of real estate described in the petition, viz.: "situate in Cleveland, Cuyahoga county, Ohio, and being the westerly 40 feet of subplot No. 8, in Bateman & Ingham's allotment of part of original lot 56 of Brooklyn township" is in the defendant John A. Canda by deed to him from William T. Ingham and wife, dated April 6th, 1907.

Having earlier in this opinion disposed of the land standing in the name of Mabel G. Hill and having shown that Joseph J. Ptak has nothing but the naked legal title to the two lots in the Hoyt allotment, we come to a consideration of the rights of the defendant John A. Canda in the two lots in the Hoyt allotment, and the 40 feet parcel in the Bateman and Ingham allotment.

We have given careful consideration to the evidence presented as to the property used in payment for these parcels.

We do not feel that it would be profitable to go into the details by which we reach the conclusion, which we do reach, that the evidence is clear and convincing that the Hoyt lots, when they were conveyed to Jan Canda by John Canda, were not paid for by said Jan Canda, from whom the legal title went by will to Barbara Canda, and from her to John A. Canda, by will, as hereinbefore stated.

Said John Canda was then in debt to such an extent that he made this conveyance for the purpose of concealing his assets and defrauding his creditors and this conveyance being thus tainted with fraud, the title derived by Barbara under the will of Jan, and the title derived by John A., under the will of Barbara, each is tainted with the same fraud, and therefore said premises are liable in a proper proceeding to be subjected to the payment of the debts which John owed at the time of his death.

We also reach the conclusion that the 40 foot parcel, being the first parcel described in the petition, was purchased and paid for by said John Canda; that the building now on said last named premises was erected at the expense of said John Canda, except

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to the extent that money was furnished by the defendant, the Pearl Street Savings & Trust Company, for which it holds a good and valid mortgage; it follows that, subject to said mortgage, said last named premises are liable in a proper proceeding to be subjected to the payment of the debts owing by said John Canda at the time of his death.

That this is so, is established by the decision of *Shorten v. Woodrow*, 34 Ohio St., 645, where it is said in the second paragraph of the syllabus:

“An insolvent debtor purchased real estate and with the fraudulent intent to conceal from his creditors his interest or ownership therein caused the vendor to convey the premises to a third person, who at the debtor’s request conveyed the same to the latter’s wife.

“*Held*: That the wife in equity holds the legal title to the premises conveyed subject to the right of her husband’s creditors to subject the same to the payment of their claims.”

This holding is made upon the well established principle of equity that a debtor will not be permitted by fraud to cover up or conceal his property in such wise as to prevent the application of it to the payment of his debts.

The question still remains whether the present action can effect the purpose of subjecting the property named in the petition, and now held, as hereinbefore pointed out. This question is not free from doubt, and has given us much difficulty.

The statutory authority as it existed at the commencement of this action, under which the plaintiff would be authorized to sell real estate, for the payment of debts, and the method of proceeding, is found in Section 6136, Revised Statutes, to and including Section 6166.

Section 6139 reads in part:

“The real estate liable to be sold as aforesaid, shall include all that the deceased may have conveyed with intent to defraud his creditors, and all other rights and interests in lands, tenements and hereditaments,” etc.

Section 6140 reads:

“If land is to be included in such action which has been so fraudulently conveyed, the executor or administrator may either

before or at the * * * same time bring an action for the recovery of the possession of such land; or he may in his action for the sale thereof allege the fraud and have the fraudulent conveyance avoided therein; but when such land is included in the application, before a recovery of the possession thereof the action shall be in the court of common pleas.”

The present action was begun in the court of common pleas, and though the theory of the plaintiff in his petition seems to be that it was under the first authority given in the section, viz., an action for the recovery of the possession of the lands described in the petition, we think the allegations are such that if a cause of action is stated for the recovery of the possession, they are sufficient to entitle the plaintiff to an order to sell, treating the action as brought under authority of the provision in the latter clause of the section in the words, “He may in his action for the sale thereof allege the fraud and have the fraudulent conveyance avoided therein.”

Applying this to the two lots in the Hoyt allotment, which we find were fraudulently conveyed by John Canda to his father Jan Canda, as Ptak makes no claim to them, avoiding the deed from John to Jan, brings this land within the clear provisions of the statute authorizing the sale of the land fraudulently conveyed.

As to the other parcel, the forty feet on which the business block stands, and which was conveyed to John A. Canda by Ingham, it is manifest that the avoidance of this conveyance would leave the title in Ingham, as pointed out in the case of *Shorten v. Woodrow*, *supra*, and so the administrator would be in no better position to give a good title than he was before the deed was avoided.

In the same case it is held that the statute there under consideration, which was the seventeenth section of the act then in force, regulating the mode of administering assignments in trust for the benefit of creditors, did not include the setting aside of deeds procured by an insolvent debtor, to be made by another than himself, to a grantee for the purpose of defrauding the creditors of the insolvent. That section provided “All transfers, conveyances or assignments made with intent to de-

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fraud, delay or hinder creditors, shall be declared void at the suit of any creditor," etc. The court said in relation to this section, as appears on page 653 of the report, that:

"The conveyance which lays at the foundation of the proceeding, and upon which alone the statute was designed to operate, is the fraudulent conveyance of the debtor himself. It has no application to a conveyance made by a mere trustee of the legal title, although such conveyance is made at the instance of the *cestui que trust*, or beneficial owner."

Section 4196, Revised Statutes, in force when this action was brought, provides that:

"Every gift, grant, or conveyance of lands, rents, goods or chattels, tenements, * * * and every bond, judgment or execution made or obtained with intent to defraud creditors of their just and lawful debts or damages * * * shall be deemed utterly void and of no effect."

On the part of the defendant John A. Canda it is urged that the two statutes are so nearly alike that to hold that the former includes only conveyance of the debtor himself and does not include such as he procures to be made by another, must necessarily result in holding that the same is true under the last mentioned; but even if this be true it does not follow necessarily that Section 6139 providing that the land to be sold shall include all that the deceased may have conveyed with intent to defraud his creditors and all other rights and interests in lands, coupled with the provisions of Section 6140 as to the way in which the action may be brought, may not include such as the deceased fraudulently caused to be conveyed by another person. The fact that the action is to be brought in the court of common pleas, having general equity jurisdiction, when the subjecting of land fraudulently conveyed is sought, whereas the action may be brought in the probate court, having no equity jurisdiction, is significant as tending to show that in one action all the equities may be determined to the end that without unnecessary litigation the administrator may be able to work out the rights of the creditors, as against those claiming under any title tainted with fraud.

It is true that he who fraudulently conveys, or causes to be conveyed lands for the purpose of defrauding his creditors, has no longer any interest in such land which can be enforced by him, or after his death by his heirs at law, but to the extent of their claims his creditors have an interest in such lands which they can enforce, and there seems no good reason why their rights may not be worked out by an administrator.

In *Bloomington v. Stein*, 42 Ohio St., 168, it was held:

“A executed to B a promissory note and warrant of attorney upon which judgment was rendered, and an execution having been issued on the judgment, the sheriff levied the same on A's goods. The note was without consideration and A was insolvent when it was executed. In doing and procuring to be done these various acts, both A and B concurred, and their object was to defraud A's creditors: *Held*: That the acts were within the statute which provides that all transfers, conveyances or assignments made with intent to hinder, delay or defraud creditors, shall be declared void at the suit of any creditor.”

It will be noticed that this was before that statute included the words now found in Section 6343, viz: “And every judgment suffered by him,” etc.

In the opinion prepared in this case by Judge Okey, at page 171, there is an intimation, at least, of doubt whether the holding in *Shorten v. Woodrow* is sound, but without saying that it is not, he says, “We have no hesitancy however in saying that we would not be warranted in this case in placing any strict construction upon this remedial statutory provision. The law regards the thing which the debtor has done rather than the means by which he accomplished it; for if he has placed his property in the hands of another to defraud his creditors, the creditor is equally injured whether the transfer was effected by a formal instrument of writing by means of a fraudulent execution, or by some other device, and equity in either case, looking through the form to the substance of the transaction, will not hesitate to grant relief, in accordance with the evidence, and the object and purpose of the statute.”

In the case of *Doney v. Clark*, 55 Ohio St., 294, Judge Shauck in his opinion, pp. 302 and 303 says:

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“Nor can it be doubted that the powers of executors and administrators are such only as may be conferred upon them by statute. This, however, does not forbid the application of remedial statutes conferring such power of the familiar rule that to the extent which their language will permit statutes of that character are to receive such construction as will accomplish the apparent object of the Legislature.”

Applying the principles announced in the cases to the case before us, it would seem to result in holding that the administrator should be ordered to sell so much of said real estate as is necessary to pay the decedent's debts, and the cost of the administration.

The purpose of the two sections of the statute, 6139 and 6140, is plainly to enable the administrator to obtain in one action authority to convert into money such real estate as ought in equity to be applied to the payment of the debts of the decedent, instead of making it necessary for the creditor to bring the action. And Section 6140 provides what shall be done when it is necessary to go into equity to do it.

True, the express letter of the statute does not authorize the subjecting of the real estate, by the administrator, to the payment of debts, where the real estate was fraudulently procured to be conveyed by the debtor, but we think the manifest purpose of the statute does include real estate so conveyed.

In the case of *Doney v. Clark*, *supra*, it was held that though the statute does not expressly authorize it, an administrator of an insolvent estate may maintain an action against a fraudulent grantee of the decedent, for the value of the land fraudulently conveyed, where such grantee has conveyed the land to an innocent purchaser. This, not upon the proposition that such fraudulent grantee was indebted to his grantor, or that the heirs at law had any rights in the land or against the grantee, but that good conscience requires that creditors shall not be deprived of their rights by the concurrent fraudulent acts of the debtor and any other person.

We reach the conclusion, therefore, that the lands now standing in the name of Ptak and in the name of John A. Canda may be subjected in this action to the payment of the decedent's debts.

It appearing that the lands in the name of Ptak will not sell for enough to pay all such debts and the costs of administration, and that the lands now standing in the name of John A. Canda will probably sell for enough for this purpose, after paying off the mortgage of the Pearl Street Savings & Trust Company, the order will be to sell the last named premises, and the case will be retained for the purpose of determining whether it will be necessary to sell any other property.

**SALES OF STOCKS OF MERCHANDISE OTHERWISE THAN IN
THE COURSE OF TRADE.**

Circuit Court of Stark County.

THE CANTON ELECTRIC COMPANY V. ERNEST GUIRLINGER, THE
MERCHANTS COMMISSION COMPANY AND FRANK SAGE.

Decided, February 21, 1910.

Sale of Merchandise in Bulk—Exempt Property.

A sale of merchandise in bulk contrary to the provisions of Section 6343, Revised Statutes, as amended April 30, 1908 (99 O. L., 241), is void as to creditors of the vendor, notwithstanding all the property sold might have been claimed as exempt by the vendor.

Lynch & Day, for plaintiff in error.

Ed L. Smith, contra.

MARVIN, J.; TAGGART, J., and DONAHUE, J., concur.

Guirlinger had a small business establishment in Canton in which he sold at retail, confectionery, fruit, ice cream and the like. The Merchants Commission Company carried on a wholesale business, selling fruit and other commodities, such as Guirlinger sold at retail. Sage carried on a retail business at Canton, and he was also one of the directors of the Merchants Commission Company. Guirlinger became indebted to various parties, including the Merchants Commission Company, the plaintiff in this action. He was a husband living with his wife; was a

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resident of the state of Ohio, and was not the owner of any homestead or any property other than the goods and fixtures in his place of business, already mentioned.

In September, 1908, Guirlinger was indebted to the commission company in the sum of about \$350. This was for goods which he had purchased from time to time from the company, and though he paid along from time to time, his indebtedness continually grew. That is, his payments for the year preceding the month of September, 1908, had been less than his purchases, so that his account was steadily growing. The company frequently called upon him for payments which they ought to get, and called his attention to the fact that his debt to them was increasing all the time. To this he answered on several occasions, that "whatever happens to me, you shall be paid." In September, 1908, he went to Mr. Wachter, secretary, treasurer and manager of the Merchants Commission Company, and said to him, "I am all in." and he proposed to pay the company his debt to it by turning over all the merchandise and fixtures in his little store. An attachment had already been levied by another creditor of Guirlinger on this property for the sum of \$75 and thereupon Wachter, acting for the company, paid the attachment creditor his \$75 and took all the merchandise and fixtures in Guirlinger's store in payment of his indebtedness to the company, together with this attachment debt.

The plaintiff was at the time of this sale a creditor of Guirlinger's, and in October, 1908, took judgment against him for the amount of its claim, and issued execution, which was returned "no goods." The Merchants Commission Company subsequently went into the hands of a receiver, and the plaintiff seeks to have the sale by Guirlinger to the commission company treated as void, and to have his claim paid out of the property which Guirlinger sold to the commission company. On the day after Guirlinger sold to the commission company, it sold all of the goods which it purchased from Guirlinger to the defendant, Frank Sage, and he paid in money the full value of the goods. The plaintiff seeks to have the sale by Guirlinger to the commission company and by it to Sage, declared void, and to have judgment against each for its *pro rata*

share of the value of the goods which had belonged to Guirlinger. The suit is brought under favor of Section 6343 of the Revised Statutes of Ohio, as amended April 30, 1908 (99 O. L., 241), and the petition avers facts which are set out in the third paragraph of that section, on page 242, that is, that the sale was not made in the ordinary course of trade in the regular and usual prosecution of the seller's or transferer's business; that the sale or transfer was of an entire stock in bulk, and therefore, in the language of the statute the sale must "be presumed to be made with the intent to hinder, delay or defraud creditors within the meaning of the section, unless the seller or transferer shall, not less than seven days previous to the transfer of the stock of goods sold or intended to be sold, and the payment of the money therefor, cause to be recorded in the office of the county recorder of the county in which such seller or transferer conducts his business, notice of his intention to make such sale."

No such notice was given in this case. Attention is called to this because it is urged here that the general creditors of Guirlinger suffered nothing by reason of this sale, because it is said that since he was a resident of Ohio, a husband living with his wife, and not the owner of any home or indeed of any other property, none of his creditors could have received any payment out of this property, because he could have claimed it all as exempt from execution, and that if he chose to waive that right in favor of his creditor, the commission company, there was no prejudice to any other of his creditors. Attention is called to this also, because the language is, "Every sale or transfer of any portion of a stock of goods, wares or merchandise, otherwise than in the ordinary course of trade," etc., whereas the greater part of the property sold to the commission company was the fixtures. But we think whatever may be said as to this paragraph of the section, the first paragraph of the section authorizes the plaintiff to have the relief, as against the commission company, sought in this action. This reads:

"Every sale, conveyance, transfer, mortgage or assignment, made in trust or otherwise, by a debtor or debtors, and every judgment suffered by him or them against himself or themselves in contemplation of insolvency and with a desire to prefer one or

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more creditors to the exclusion in whole or in part of others, shall be declared void as to creditors of such debtor or debtors at the suit of any creditor or creditors," etc.

It will be noticed that the transferring of property mentioned in this paragraph is not in any wise affected by the fact that the debtor transfers property to his creditor which he might have claimed as exempt from execution.

The second paragraph provides in these words:

"Provided however, that the provisions of this section shall not apply unless the person or persons to whom such sale, conveyance, transfer, mortgage or assignment be made, knew of such fraudulent intent on the part of such debtor or debtors," etc.

We hold that the commission company when it accepted this property in payment of its claim against Guirlinger, knew of his insolvency, and knew it from the facts which have already been stated in this opinion, and therefore, the sale to it was void as against the other creditors of Guirlinger. The sale by the commission company to Sage was not in payment of any antecedent debt owing to him by anybody. He paid all that the property was worth and is entitled to hold it. The value of the property is held to be the amount which Guirlinger owed to the commission company at the time of the sale of it, and a decree will be entered for an accounting by the commission company, or its receiver, of this amount and the payment to the plaintiff of its *pro rata* part thereof.

INJURY TO PEDESTRIAN ON A DEFECTIVE WALK.

Court of Appeals for Hamilton County.

MARY E. MOONEY v. LOUIS J. HAUCK.

Decided, July 16, 1913.

Abutting Owner—Liability of, for Defective Covering Over Areaway Beneath Sidewalk—Question as to Existence of a Nuisance Resulting Therefrom One for the Jury.

The abutting owner becomes liable to a pedestrian who is injured by a fall caused by a defective covering of an areaway beneath the sidewalk, notwithstanding the statutory duty of the municipality to keep sidewalks in repair, and the question whether the defect in a particular instance was of such a character as to become a nuisance is one which should be submitted to the jury.

Otis H. Fisk and Sanford Brown, for plaintiff in error.

Harmon, Colston, Goldsmith & Hoadly and Oscar Stoehr, contra.

JONES, O. B., J.; SWING, J.. and JONES, E. H., J., concur.

The action below was for damages resulting from injuries suffered by reason of a fall caused by a defect in a sidewalk, while plaintiff was walking thereon. It was brought against the owner of the premises abutting upon the defective sidewalk. The defects alleged consisted of an open areaway constructed and used in connection with the house of the defendant extending into the sidewalk about three or four feet and along the front four or five feet, the covering of which areaway was iron or metal containing many round openings two or three inches in diameter, made for the purpose of being covered or filled with pieces of glass commonly called bulls-eyes; and said covering was defective and unsafe in that many of said openings or perforations were not closed up, filled or covered but were open and unprotected. Plaintiff alleged that while exercising due care as a pedestrian she stepped upon such covering whereupon the heel of one of her shoes caught in one of said unprotected openings and caused her to fall and fracture her ankle. She charges

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negligence against the defendant in creating and permitting said defect, in permitting said openings to remain open and so maintaining them in this defective condition, and charges knowledge of said defendant concerning such condition, or that by the exercise of due and ordinary care and diligence on his part defendant could or would have known of said defect in time to have had same repaired and thereby avoided injuries to the plaintiff.

Defendant demurred to the amended petition, and the court below sustained said demurrer, and the final judgment was entered in favor of the defendant. Defendant insists that the primary duty of keeping streets and sidewalks in proper repair and condition rests upon the city and not upon the owner of abutting property, and that therefore the demurrer was properly sustained. Elaborate and exhaustive briefs have been filed by each side, in addition to the full oral argument that was made to the court, but it is not deemed necessary by the court to discuss the numerous authorities set out by each side. The case of *Morris v. Woodburn*, 57 O. S., 330, seems to cover the principle of the case at bar. The syllabus is as follows:

“If the owner of a lot abutting upon a street of a municipality, for the use of his property, constructs a vault under the sidewalk over which he negligently places and maintains a defective covering, he is liable directly to a footman injured thereby, notwithstanding the omission by the municipality of the duty imposed upon it by statute to keep the street in repair.”

In the opinion of the court, Shauck, J., uses the following language:

“But while the tort of the city consisted in the failure to discharge a duty imposed by statute, that alleged in the amended petition against Mrs. Morris consisted in the creation of a nuisance, dangerous to those using the walk. These are concurrent and related torts, but they are not point. In view of their independent character, the plaintiff might, at her election, maintain her action against either the city for its omission of duty, or against Mrs. Morris for the creation of the nuisance which occasioned her injury. And it appears from reason and authority that the primary liability in such case is upon him who actively creates the nuisance; so that if a recovery were had against the city it might in turn recover from the perpetrator of the wrong.

Chicago v. Robbins, 2 Black, 418; *same v. same*, 4 Wall., 657; *Rochester v. Campbell*, 123 N. Y., 405."

It is urged by counsel for defendant however that the principle of this case is limited to an act of commission on the part of the owner; that the allegation must appear in the petition directly charging the property owner with the defective construction of something that becomes a nuisance, in addition to its continued maintenance. We do not think that the language is to be so narrowed as is contended for, but that where the original construction might have been without fault, if it should be allowed by reason of accident or non-repair to become a nuisance, such failure to repair might itself become the creation of a nuisance and come within the terms of the above case.

The question raised by the petition is one of fact, and should have been submitted to a jury in accordance with the principles laid down in the recent case of *Gibbs v. Girard*, to appear in 88 O. S. (now found in Vol. 11 Ohio Law Reporter of July 7, 1913). The demurrer to the amended petition below should have been overruled.

The judgment is therefore set aside, and the cause remanded for further proceedings.

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**PROVISION FOR SALES OF MERCHANDISE COVERED
BY MORTGAGE.**

Circuit Court of Stark County.

ASSIGNEE OF J. R. SMITH v. O. C. VOLKMORE.

Decided, February 21, 1910.

*Mortgage of Goods With Right to Sell Reserved by Mortgagor, and
Accounting for Proceeds to Mortgagee—Conduct of Parties.*

1. A provision in a chattel mortgage on a stock of merchandise that the mortgagor may make sale of the merchandise in the usual way, making an accounting of such sales to the mortgagee at the end of thirty days, intends that at the accounting the mortgagor shall pay over the proceeds of the sales to the mortgagee, and brings the mortgage within the first paragraph of the syllabus of the case of *Kleine et al v. Katzenberger & Co.*, 20 O. S., 111.
2. Notwithstanding such provision in a mortgage of merchandise, it will be considered void as against creditors of the mortgagor, if the circumstances and conduct of the parties shows that such accounting was never acted upon by the parties, or intended to be acted upon.

D. F. Reinohl, for plaintiff in error.*J. W. Albaugh*, contra.

MARVIN, J.; TAGGART, J., and DONAHUE, J., concur.

The facts in this case are briefly as follows: Smith was a merchant doing a small retail business in this county. On the 10th day of December, 1903, he borrowed from Volkmore, \$115; on the 6th day of March, 1906, he borrowed the further sum of \$274 from Volkmore; on the 20th day of March, 1906, he borrowed the further sum of \$245.29; on the 3d day of April, 1906, he borrowed the further sum of \$275 from Volkmore, and on the 12th day of May, 1906, the sum of \$342. For each of these several loans he gave to Volkmore his promissory note at the time of the loan, to secure the payment of which at the time of the giving of the first note he executed a chattel mortgage on his stock of merchandise and the fixtures in his store. In this first mortgage it was provided that Smith might go on

with the sale of the merchandise in the usual way, making an accounting of such sales to Volkmere at the end of thirty days. Upon the giving of each of the other notes, he executed and gave to Volkmere a chattel mortgage on the stock of merchandise, and each contained the provision that Smith might continue to sell the merchandise in the usual way, making an accounting to Volkmere at the end of sixty days. Nothing was ever paid upon either of the notes, nor was any accounting ever made by Smith to Volkmere of his sales. Smith continued to do business and sell goods from his store in the usual way, up to the 19th day of May, 1906, when he made a general assignment for the benefit of his creditors in the probate court of this county. Volkmere made an application in the probate court for an order upon the assignee to pay him out of the avails of the sale of the property, so assigned, the amount of his several claims, and the court refused to make the order. Thereupon, the case was appealed to the court of common pleas. The result of the trial in that court was an order on the assignee to pay to Volkmere the amount of his several claims, as evidenced by the promissory notes, already mentioned. To this order error is prosecuted here.

On the part of the plaintiff in error it is urged that each of these several chattel mortgages, expressly giving to Smith authority to go on in the usual way and sell the merchandise covered by the mortgage, renders the mortgage void. The general proposition that a chattel mortgage executed upon a stock of merchandise, where the mortgagor is permitted to retain possession of the mortgaged goods and sell the same in the usual course of business, is void, is admitted by the defendant in error, and indeed is so well established by the authorities, that it could not with any force be denied. But it is urged that the provision contained in each of these mortgages that the mortgagor shall account to the mortgagee at a fixed time in each case, takes these mortgages out of the general rule.

So far as Ohio authorities are concerned, the case of *Kleine, Hegger & Co. v. L. Katzenberger & Co.*, 20 Ohio St., Ill., is relied upon.

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The syllabus in that case reads:

"1. A stipulation in a mortgage of goods, that the mortgagor shall retain possession and sell the goods in the usual retail way, paying over the money received therefor to the mortgagee, as the goods are sold, does not render the mortgage, *per se*, fraudulent and void as against other creditors of the mortgagor. The question of good faith arising upon such stipulation is one of *fact*, for the determination of the jury.

"2. The true rule is that a chattel mortgage, which reserves to the mortgagor possession, with a power of disposition *for his own benefit*, is void. This latter qualification must be inserted in the previous cases."

This proposition is not denied by the plaintiff in error, but on his behalf it is urged that the facts here show that it was not the understanding between the mortgagor and the mortgagee that the mortgagor should continue to sell the mortgaged goods and account for such sales to the mortgagee and pay over to him the avails of such sales at stated time. Indeed, it is urged in argument, that the language used in the stipulation as to accounting, does not include the paying over the money, arising from the sales to the mortgagee.

If this contention is sound, it results that, applying the law as announced in the case just cited, these mortgages are void. But we think a more liberal construction may be given to the words used in the stipulation, and hold that in and of themselves they would constitute a provision that would require of the mortgagor not only to render a statement of his sales to the mortgagee, but to pay over to him the avails of such sales; that all this might fairly be included in a provision that he should account to the mortgagee for such sales. But from the conduct of the parties in this case we may well infer that neither of them understood that the latter was the construction put upon the contract by them. The first mortgage was dated in 1903. No accounting in any sense was ever made under this contract, either by report of sales or by paying over any avails, although the business was continued by the mortgagor for two and a half years or thereabouts, after the execution of the mortgage.

It is urged as a reason why no accounting was ever insisted upon under this mortgage, that it covered not only the merchandise but the store fixtures as well, and that such store fixtures were practically sufficient to secure the indebtedness which this mortgage was given to secure, and that as the fixtures were not to be sold, the mortgagee might safely rely upon his security upon such fixtures, and so safely waive the provision for accounting. As to the others, it is urged that the sixty days had not elapsed between the giving of the last three mortgages and the time of the general assignment; that as to the giving of the mortgage of March 6, 1906, and the time of the general assignment, but little more than sixty days had elapsed, and that the defendant in error called upon Smith several times to make an accounting on that mortgage, but was put off by the statement that he would make such accounting shortly, but was too busy just at the time required by the terms of the contract.

If the mortgagee in good faith intended that the avails of the sale of these goods should be paid to him, it seems very extraordinary that even though sixty days had not elapsed after the giving of the mortgage of March 6, 1906, when he made the loan on March 20, 1906, he should not then have insisted that what had up to that time been received from sales made between the 6th and the 20th of March should be used as a part of the loan of March 20th, 1906. He says that at the time of each loan Smith said to him that he must have the money to pay for merchandise which he had in the store. Smith had no right to use any of the money received from the sale of merchandise for the payment of debts other than to this mortgagee, if the avails of the sales were to go to the mortgagee, and so the natural thing for the mortgagee to have done on the 20th of March, when Smith applied for the loan on that date, was to require of him (Smith) to take what money he had received, and then loan to him such an amount, in addition to that, as would pay the \$245.29 of indebtedness, which he said he needed to borrow to pay for merchandise. This same reasoning applies equally to the loan made on the 3d of April, 1906, and applies with much greater force to the loan made on the 12th of May, 1906, because at the

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time of this last loan, an accounting was due under the terms of the contract for the loan made on March 6, 1906, more than sixty days having elapsed between these two dates. If Volkmere understood that all the avails of the sale of the goods made after the giving of the mortgage of March 6, were to be applied in payment of the debt secured by that mortgage, it is incredible that he should have loaned Smith \$342 after the time when that money was to be paid over to him, without requiring that whatever money had been received for sales should be used as a part of this loan. We regard the conduct of Volkmere as completely negating the idea that it was the intention of the parties that the avails of the sales should be used in the payment of the notes secured by these several mortgages, and that, therefore, we must hold Smith not only was *not* required, but that it was *never* understood between the parties that he should be required to keep the avails of the sales made by him of these mortgaged goods, to be used for the one purpose of paying off the mortgage debt.

It is said that the amount of business done by Smith was very small; that the amount of money received by him, as he stated to Volkmere, for goods sold, was but a little. It is said further, that all of the money received on these several loans was used by Smith in the payment of debts for this merchandise, but that Volkmere was so informed by Smith at the time of the several loans. Volkmere must have known that it required some money for Smith to support himself and family, and that it must have required some money for Smith to carry on the business, and that if he used all the money that Volkmere loaned to him each time to pay debts upon this merchandise, he must have used some of the money that he received on the sale of the goods for his support and the carrying on of the business. Especially must Volkmere have so understood when Smith reported to him as he says, at each time when he made a loan, that the money received on such loan would pay the debts which he owed, outside of the debt to Volkmere, and then when he came to make another loan, reported that he found he owed other debts which he had overlooked. It will be noticed that he borrowed a larger

amount on the 3d of April than he had borrowed at any one time before then and that the loan of May 12 was considerably in excess of the loan of April 3d.

We reach the conclusion that neither of the parties understood in good faith that the avails of the sales would be devoted strictly and entirely to the payment of the debts undertaken to be secured by these several mortgages, and that therefore, as against the other creditors of Smith, each of the mortgages is null and void, with the exception of the first mortgage covering the fixtures in the store, and that is sustained, to the extent of the avails of the sale by the assignee of the property, included in that mortgage, other than merchandise; and except to this extent, the judgment of the court of common pleas is reversed.

**ALIMONY TO WIFE WHERE BOTH PARTIES WERE
BLAMEWORTHY.**

Circuit Court of Stark County.

VASTI A. CARR V. WILLIAM A. CARR.

Decided, February 21, 1910.

Alimony—Separation on Account of Ill-Treatment—Both Parties to Blame.

Small alimony will be decreed a wife on the ground of "separation in consequence of ill-treatment on the part of the husband" where it appears that ill-treatment on her part equals his.

William Roach, for plaintiff in error.

Craine & Snyder, contra.

MARVIN, J.; TAGGART, J., and DONAHUE, J., concur.

The parties to this action are husband and wife. The plaintiff sues for alimony only, and relies upon certain ill-treatment which she says she has received from the husband, as her cause of action. The action is brought under Section 5702, Revised Statutes, subdivision 4, which reads in part as follows:

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“That there is a separation in consequence of ill-treatment on the part of the husband.”

The parties were married in June, 1892. Ten children have been born of this marriage, six of whom are still living, four having died. Five of these children were born within the first three years and three months of the marriage. The children now living are: Elizabeth, 17 years old; Mary, 13 years old, and the four younger ones aged respectively, 11, 10, 7 and 6 years. The plaintiff is a better woman than her husband thinks she is, but not as good, and certainly not as good a wife as she thinks she is. The defendant is a better man than the plaintiff thinks he is, but not as good a man as he thinks he is. The statement already made as to the birth of children in this family shows that this plaintiff has a great burden upon her, in the matter of bearing and caring for children. Not on that account, however, should her husband be censured, but attention is called to it as showing that in the condition in which she must have been the greater part of the time from the date of the marriage up to six years ago, she was entitled to tender treatment on the part of her husband. This large family also put a heavy burden on the husband, for which the wife is not to be blamed; but he is a man of small means and of course it was a burden to him; one which it was his duty to bear and bear patiently, to care for this large family. The parties have lived on a small farm of about thirty-eight acres, and of course close economy and untiring industry would be necessary on the part of each to care for this family. Each seems to have been rendered exceedingly irritable by the conduct of the other, and undoubtedly that was accelerated by the burden placed upon each. We listened to the testimony of those acquainted with the parties, and from it we have no doubt that the husband many times used profane language when talking to his wife, and unreasonably blamed her for things which she ought not to have been blamed. We think she makes a sufficient case to show ill-treatment such as would entitle her to some alimony. But we can not overlook the fact that she sometimes used abusive language to her husband and that she said unseemly things to him in the presence of their children.

The two older children, Elizabeth and Mary, are witnesses. Their appearance on the witness stand was such as to produce on the part of the members of the court a high opinion of their intelligence and of their desire to be entirely truthful. Each of these girls says (and we think the whole evidence shows it) that this family can not get on together, and that the absence of the mother from home has made it happier and pleasanter. That the household is fully as well cared for without the presence of the mother as with it, is also shown; indeed, from what the witnesses say, we are inclined to the opinion that the cleanliness of the persons and clothing of the children, and the keeping of their clothing in repair, making them look suitable for school, etc., is improved by the absence of the mother. She left her husband's home on the 5th of January, 1909. She has been back to see the children four times; twice before the case was tried in the court of common pleas, and twice since. It is urged that she should be given the custody of at least the two younger children, because of her affection for them. She undoubtedly loves all of them, but situated as she is, we very much doubt whether even the youngest of the children would be as well off with her as she will be remaining with the father. And the plaintiff does not seem to have worried very much about it, considering that she has been but a few miles from them, and has made no greater effort to see them than she has. She left home several years ago for some cause unexplained to us, leaving a baby less than two years old, and was gone two months, evidently making no effort to see the children. We have the feeling that she ought not to have their custody at present, and the order of the court will be that the custody of the children shall remain in the defendant.

The defendant has a farm worth probably about \$3,500; he owns a lot in the city of Alliance, worth probably \$500. There is a mortgage on this farm for \$2,200 and he owes other debts amounting to about \$800. He will have a hard struggle to support this family and keep up the interest on his indebtedness. It will be hard for him to raise money to pay alimony. The plaintiff is not in first rate health, but she is a woman of some

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education. She is shown to have been a successful teacher prior to her marriage, and it is probable that she may still obtain employment as a teacher and be able to comfortably support herself.

The order of the court will be that the custody of the children shall be in the defendant, and that he shall pay to the plaintiff on or before the first day of April, 1910, the sum of one hundred dollars, and that on or before the 1st of April, 1911, another one hundred dollars, with interest thereon from the first day of April, 1910, until such payment is made, and that on or before the first day of April, 1912, he shall pay another hundred dollars with interest from the first day of April, 1910, until such payment is made. This to be in full of alimony. This amount is small, because from the amount of property and the family which the defendant has to support, it must necessarily be small, and furthermore, because the plaintiff still has her inchoate right of dower in all of his real estate, except to the extent that she may have deeded it away by the execution of the mortgage already mentioned.

CHANGE OF CAUSE OF ACTION ON APPEAL.

Circuit Court of Stark County.

THE ALLIANCE MONUMENTAL COMPANY V. S. ELLEN WELLS, ADMINISTRATOR OF THE ESTATE OF S. PETER WELLS, DECEASED.

Decided, February 21, 1910.

Jurisdiction on Appeal from Justice—Different Cause of Action—Stated in Petition—Petition Stricken from Files.

Plaintiff sued before a justice of the peace for the agreed price of a monument sold and delivered to the defendant at her request; on appeal he filed a petition setting forth a contract between the parties for the monument, alleging that the defendant repudiated the contract and ordered work upon the monument to be stopped, which was done, and claiming damages for the breach of the contract. *Held:*

The cause of action stated in the petition in the common pleas court varied so from the cause action stated in the bill of particulars

filed with the justice, that the common pleas court was justified in striking said petition from the files.

John W. Craine, for plaintiff in error.

David Fording, contra.

MARVIN, J.; TAGGART, J., and DONAHUE, J., concur.

The parties here are as they were in the court below. The plaintiff brought a suit against the defendant before a justice of the peace, setting out in his bill of particulars that the plaintiff had sold and delivered to the defendant, at her request, a certain monument, at the agreed price of \$220. Before the justice of peace the plaintiff recovered. The case was then appealed by the defendant to the court of common pleas, and the plaintiff filed a petition, setting out that the defendant entered into a contract with the plaintiff, wherein the plaintiff undertook to erect at the grave of the deceased, a monument for \$220. That before the monument was completed the defendant repudiated the contract and ordered work to be stopped upon the monument, which was done; that the plaintiff had expended in labor and material upon the monument the sum of \$210; that such labor and materials were of no value, except the monument should be accepted, and it prayed judgment for the sum of \$210. On motion of the defendant the petition was stricken from the files. The plaintiff then moved for leave to file this same petition, which was refused, and then, the court ordered (the plaintiff not offering to file any other petition) that the cause be dismissed at the costs of the plaintiff. The ground upon which the court acted was, that the petition set out a different cause of action from that set out in the bill of particulars before the justice of the peace. There was no error in this action of the court. This is supported by numerous decisions.

Attention is called to the case of *Nicholas v. Poulson*, 6th Ohio Reports, 306. In this case attention is called to the fact that when an appeal is taken from a justice of the peace "the justice shall transmit the bill of particulars," etc.; this provision is still contained in the statute, and the court in discussing it, uses this language on page 308:

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"Inquiry may well be made for what purpose is this bill of particulars required to be certified to the common pleas unless the plaintiff is to be confined to it on the trial? The law does not intend to compel the performance of a vain, idle or foolish thing, and this would certainly be such if the plaintiff was not confined to it by the trial in the court of common pleas. The object of this statute was undoubtedly to confine the plaintiff to the same cause of action on the appeal that he litigated below and there is reason in this construction. It puts it out of the power of the plaintiff to commence his suit for one cause of action before the justice, and to entrap a defendant by proving another, as he might, in the common pleas, under a declaration containing the common counts in assumpsit, or in almost any other form of action."

In the case of *McCoy v. Thompson*, found on page 649 of Wright's Reports, the court says, after calling attention to the fact that the statute requires that the transcript be certified up with the appeal, where an appeal is taken from the decision of a justice of the peace:

"Why require the justice to send up the bill with the other papers when the case is appealed, if not intended to be used when sent up? What other use could be made of it, than to confine the evidence to it at the trial?"

In the case of *Van Dyke v. Rule*, 49 Ohio St., 530, the second paragraph of the syllabus reads:

"Where an action begun before a justice of the peace is appealed to the court of common pleas, the latter court has no power to substitute, by amendment, another cause of action not within the jurisdiction of the justice of the peace, though it is within the original jurisdiction of the court of common pleas, unless the defendant consents to the substitution, or waives his right to object to the action of the court."

This language, taken by itself, might apply to the amendment which stated a cause of action other than that set out in the bill of particulars, where by such change the cause is made one in which the justice of the peace did not have jurisdiction. But in the opinion, at page 535, it is said, "And it is equally certain that the appeal confers on the appellate court jurisdiction only of the cause of action appealed," showing that the reason why

a change may not be made is that it is only the case which was tried before the justice which can be tried on the appeal.

In the case now under consideration the cause of action stated in the petition was wholly different from that set out in the bill of particulars. Before the justice the action was upon a contract which the plaintiff said existed between the parties, and which, on its part, had been completed. That set out in the petition filed in the court of common pleas was a denial of the claim made in the bill of particulars that the contract had been completed.

Before the justice of the peace the plaintiff, in order to recover, must have shown that he performed all that by the terms of the contract was required to be performed; whereas, if his cause had been tried upon the petition, it would have been required to show that it never did complete the contract; that the defendant wrongfully prevented it from completing the contract. The suit before the justice was for liquidated damages, an amount fixed by contract between the parties. The petition claimed judgment for unliquidated damages, growing out of the repudiation of the contract by the defendant. The evidence necessary to establish the action before the justice would have defeated the action brought in the court of common pleas. The evidence necessary to sustain the petition would have defeated the action brought before the justice. The departure was a substantial one, and the court below was right in refusing to allow such petition to be filed and was right in dismissing the action at the costs of the plaintiff, and the judgment is affirmed.

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VALIDITY OF ORDINANCE APPROVED BY VICE-MAYOR.

Circuit Court of Lorain County.

HARRY A. POUNDS V. CITY OF ELYRIA.

Decided, April 29, 1910.

Municipal Ordinances—Veto of Mayor—Approval of Vice-Mayor.

An ordinance of a municipality which the mayor thereof vetoes and returns to the council before its next session, is not rendered valid by the approval of the vice-mayor and his signature to it, given in the interim on a day when the mayor is temporarily absent from the city.

H. A. Pounds and P. H. Boynton, for plaintiff in error.

H. A. Pounds, contra.

MARVIN, J.; WINCH, J., and HENRY, J., concur.

Suit was brought by Pounds, as solicitor, on behalf of the city of Elyria, at the request of a tax-payer. The purpose of the suit is to enjoin the city authorities from paying certain officers of the city salaries to which these several officers claim to be entitled. Unless restrained by order of the court the city authorities will pay the salaries, it is claimed on the part of the plaintiff, to several officers to which salaries it is claimed the several officers are *not* entitled.

The whole question depends upon the validity of an ordinance passed by the council of the city of Elyria on the 14th day of December, 1909, fixing the salaries of these several officers. If that ordinance is valid, the petition in this case must be dismissed. If invalid, the injunction must be granted. On the date last mentioned, one David S. Troxel was mayor of the city of Elyria, and F. N. Smith the president of the council of said city. On the evening of that date the ordinance referred to was passed.

The statute in force at the time provides that:

“Every ordinance or resolution of council shall, before it goes into effect, be presented to the mayor for approval, the mayor, if he approves the same, shall sign it. and return it forthwith to

council; but if he does not approve it, he shall, within ten days after its passage or adoption, return the same with his objections to council, or, if council is not in session, return it to the next regular meeting thereof, which objections council shall cause to be entered upon its journal."

Another section of the statute in force at the time reads:

"When a mayor is absent from the city, or is unable for any cause to perform his duties, the president of council shall be the acting mayor."

The council having passed the ordinance, as already stated, on the evening of the 14th of December, 1909, it was left with the clerk, or deputy clerk of the city, in the clerk's office, and on the morning of the 15th of December the mayor's attention was called to it by the clerk or deputy clerk. He took no action whatever in regard to the matter at that time except to say that he would look into the matter. On the next day, the 16th of December, the mayor went to Cleveland in the early part of the day and returned home to Elyria in the evening, after business hours. Before the next meeting of the council, which was the 21st of December, the mayor had prepared a message vetoing the ordinance, which was sent to the council and read at its meeting on the 21st of December. Meanwhile, however, on the 16th of December while the mayor was in Cleveland, the president of the council had signed this ordinance, approving it, claiming to act under the statute as mayor, the mayor being absent from the city. If the action of the president of the council in signing this ordinance, as approved by him, constitutes it a valid ordinance, the affairs of the several municipalities in this state are in a most remarkable situation, and are very little, if any, protected in any wise by any vetoing power conferred upon the mayor. In the city of Akron the present mayor has a summer residence where he spends with his family, probably half of the year, some five miles out of the city. An electric railway passes his country home, which affords him means of going between the city and such home every thirty or forty minutes, but still, while he is at that home he is outside the city, and if it is to be held that the moment the mayor is outside of

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the city limits the president of the council, or vice-mayor, as we call him, can act, all that it is necessary at Akron for the vice-mayor to do, if he knows that his views and those of the mayor do not correspond, is to watch until the mayor shall get beyond the boundary line of the municipality and then approve an ordinance which has been passed, and which he knows the mayor intends to veto. Indeed, if the claim of the defendant here is sound, the mayor might have prepared a veto message on the 15th ready to be delivered to the council; the vice-mayor might have known that such a message was already prepared and would be presented to the council at its next meeting, and yet he might, by simply signing his name to this ordinance, make it valid. The claim is unsound. It is not a fair construction of the statute which provides that the president of the council shall be the acting mayor when the mayor is absent from the city, nor to say that this means that every time the mayor gets outside of the lines of the municipality the vice-mayor may at once take up the duties of the mayor and perform them without reference to what length of time the mayor is expected to be absent. It is true that the mayor was absent when this ordinance was signed. It is equally true that neither the vice-mayor nor the city clerk nor anyone else had a right to suppose that he would be absent beyond the evening of that day, the 16th of December, and it is absurd to say that the Legislature intended that in a temporary absence like that and on a matter that the mayor had a week in which to act, the vice-mayor might take it up and act on it and thereby prevent any action of the mayor from having any effect on the legislation. The reason given in the argument for the hurry of having this ordinance approved does not commend itself to the court. It is said that in order to get the publication of this ordinance in one of the newspapers, in which by law such publication must be had, and so have the ordinance become valid to be of benefit to the incoming officers, it was necessary that it be approved that day, but this was as well known long before, as on that particular day, and the council could have passed the ordinance at an earlier day, or those interested in it could have seen the mayor on the 15th, and if they found that he would approve the ordinance, could have obtained his

signature on that date, but as it turns out that the mayor would not approve the ordinance, it is perfectly manifest that it would have been of no avail to these officers to have presented the matter to the mayor on the 16th, because he would not have approved it.

The injunction prayed for is allowed.

FAILURE OF BEQUEST TO CHURCHES—DISPOSITION THEREOF.

Circuit Court of Medina County.

J. ANDREW, EXECUTOR OF THE LAST WILL AND TESTAMENT OF
MARY JOHNSON, DECEASED, v. ERNEST KLING ET AL.

Decided, September 26, 1910.

Will—Construction Of.

A bequest of "all my personal property of every kind whatsoever, except what is hereinafter by this will disposed of to other parties," does not carry with it money in the bank bequeathed by a subsequent clause of the will to two churches, which by reason of the statute against bequests within a year of testator's death, can not take thereunder.

MARVIN, J.; WINCH, J., and HENRY, J., concur.

The plaintiff filed his petition under the statute, setting out that he is the executor, duly appointed, qualified and acting, of the last will and testament of Mary Johnson, deceased; that a considerable amount of money is in his hands for distribution as such executor, and his prayer is that the court construe the will of the deceased and direct him in the disposition of this money. The facts are not in dispute and are substantially these:

Mary Johnson died in Medina county, Ohio, on the 8th day of June, 1909. On the 5th day of June, 1909, she executed a last will and testament, which has been duly admitted to probate, and of which the plaintiff is the executor.

The first, second, third, fourth and fifth items of said will are in the following words:

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“First. It is my will that all my just debts and funeral expenses be first paid.

“Second. It is my will and I hereby give and bequeath to my beloved friend, Mary Yocum of Medina, Ohio, all my personal property of every kind whatsoever, except what is hereinafter by this will disposed of to other parties.

“Third. It is my will and I hereby bequeath to my beloved friend Lizzie Miller my family Bible, the one that I brought from England.

“Fourth. It is my will and I hereby give and bequeath to my beloved friend Martha Marbach my gold ring, the one that I wear and also my silk quilt.

“Fifth. It is my further will and I hereby give whatever money I have in the bank (after paying my funeral expenses and all other debts and valid claims against me) as follows: one-half thereof to the Church of Christ (formerly known as the Disciple Church) of Brunswick, and the balance to the Baptist Church of Medina; that is I want my money in said banks equally divided between said Disciple Church of Brunswick and the Baptist Church of Medina, share and share alike.”

The only heir at law of the deceased at the time of her death was the defendant, Clara E. Kling. She is a great granddaughter of the testator and is now some two or three years of age. Shortly before the death of the testator, Clara May Kling, who was the mother of the said Clara E. Kling, and who was herself a granddaughter of the testator, died. In April, 1909, while Clara May Kling was still alive, the testator purchased, paid for, and caused to be deeded to the said Clara May Kling and her husband, Ernest J. Kling, a home in the village of Medina, for which she paid \$2,400.

The property of the testator at the time of her death consisted exclusively of about \$50 and about \$3,800 which was deposited in one or more of the banks of the village of Medina. It will be noticed that the will was executed much less than one year before the death of the testator, indeed only three days before her death; by reason of this the attempted bequests to the two churches named are invalid, under Section 5915 of the Revised Statutes of Ohio, and the question to be determined here is to whom shall the executor make payment of the money remaining in his hands, the chattels being disposed of, as directed in the

will? The executor makes no claim as to either of the parties, but simply, as already said, asks the direction of the court.

Mary Yokum was represented by counsel on the hearing, as was also the infant, Clara E. Kling. The claim made on behalf of Mary Yokum is that the second item of the will is in effect a general residuary clause, and that by reason of the language there used, to-wit, "I hereby give and bequeath to my beloved friend Mary Yokum, of Medina, Ohio, all my personal property of every kind whatsoever, except what is hereinafter by this will disposed of to other parties" is to be read as though the word "effectually" followed the word "is," so that it would give to Mary Yokum all that is not effectually bequeathed elsewhere. This claim is, as we view the case, entirely in accord with the holding of this court in the case of *Davis, Executor, v. Hutchins*, 15 Cir. Ct., 174. The holding of the court in that case was in accordance with authorities cited and quoted in the opinion. The judgment in that case, however, was reversed in the Supreme Court, as reported in the 62d Ohio State at page 411, where the title of the case is given as *Davis v. Davis, Executor, et al.*

When this case was being heard it was suggested that the Supreme Court had itself reversed itself or its holding in this case in a later case. On examination, however, it is found that this is a mistake, and that in a later case growing out of the settlement of the same estate, under the same will, in which the Supreme Court also reversed this court, it later in another case in effect reversed that holding. The question, however, involved in the case last mentioned, is in no wise affected by the question involved in the case of *Davis, Executor, v. Hutchins*, reported in the 62d Ohio St., 411. We regard that holding as settling the question raised here, in favor of Clara E. Kling, and we might content ourselves with saying nothing more. However, we are disposed to give some of the reasons why this case should be decided as already said rather than to leave it upon the decision of *Davis v. Davis, Executor, supra*.

With some reason it can be said that the testator evidently felt that she had done what she ought and all that she ought for her granddaughter, Clara May Kling, by presenting to her the home, of which mention has already been made, and that

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the infant child of her granddaughter could have no greater claim upon her than the mother of such infant. That she did not therefore intend to make any further provision for the Kling family is perfectly clear by the terms of the will. She made no further provision for them in the will, nor did she intend to make any further provision for them, and she doubtless thought that she had done for them all that she reasonably ought to do. But it seems equally manifest that she did not intend to make any provision for Mary Yocum other than to give her the household furniture, not so much for its money value, as a token of the friendship which she entertained for her. She gave to her all of her personal property, except *something*. What did she except? What did she mean to except? Clearly the Bible, the ring and the silk quilt mentioned in the third and fourth items of the will. It seems to us equally clear that she meant to except the money in the bank. If she did mean to except it and the will is to be carried out in accordance with her clear intention, then Mary Yocum is not entitled to this money and it leaves this situation:

That as to the money, since it can not go to the churches as the testator desired that it should, there is nothing in the will to indicate what she did desire to have done with it in the event that the churches could not take it.

Of course the testator supposed that the churches could and would take it. In this she was wrong, dying as she did within the year, and so this part of her property is left without any indication by the testator as to what she wanted done with it under the circumstances as they now exist, and which she did not foresee. That being so, the law determines where it shall go, to-wit, to the next of kin. The defendant, Clara E. Kling, is such next of kin, and the order of the court is that as to what there is of this money for distribution, it be paid to Clara E. Kling, or rather to the duly appointed guardian of her property.

The costs of this proceeding will be paid by the executor out of the estate.

PROPERTY DAMAGED BY BACKING UP OF SEWER.

Circuit Court of Summit County.

AUGUST MERZWEILER V. CITY OF AKRON.

Decided, April 8, 1910.

Municipal Corporation—Negligence as to Sewers.

A municipal corporation is liable for damages to a lot owner by the flowing back into his cellar of filth from a sewer with which it is attached, by reason of the negligent overloading of said sewer by the municipality.

MARVIN, J.; WINCH, J., and HENRY, J., concur.

The relation of the parties here is as the relation was in the court below.

The plaintiff brought suit against the city to recover damages which he claims to have sustained by reason of the action of the city in connection with a sewer in North Forge street, in said city, upon which his premises abut, and which premises he claims were greatly injured by reason of what the city did and failed to do in connection with such sewer.

Before the case was ready for trial numerous pleadings by both parties had been filed, and the issues were finally made up by a second amended petition and answer thereto, and a reply to such answer. After the impanneling of a jury in the case the defendant objected to the introduction of any evidence by the plaintiff, which objection was sustained, and the court directed the jury to return a verdict for the defendant, which was done accordingly. Judgment was entered upon this verdict. All of this was objected to by the defendant and exception taken to the action of the court. Judgment having been entered, such proceedings were thereafter had that the case is properly here for review.

The only question presented by the record is as to the sufficiency of the second amended petition; whether it alleges facts which entitle the plaintiff to any relief.

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The plaintiff charges that all the sewer work and construction mentioned in the petition was done by the city without any regard to any plan or system of sewerage; that in 1897, the defendant constructed a sewer 8 inches in diameter along said North Forge street; that the same was constructed for and was sufficient only for the proper drainage of the property abutting upon Forge street. That down grade in the sewer is to the east, and is much greater west of the premises than it is east of the same, causing a much more rapid flow therein from the west than the flow to the east and overburdens that part with a tendency toward filling the sewer to the east. After the construction of said 8 inch Forge street sewer, the plaintiff says, the said defendant from time to time constructed the several sewers hereinafter mentioned, without any reference whatever to any plan or system of sewerage, and without any plan or system whatever; all of which sewers drain into said Forge street sewer west of plaintiff's said property. And said defendant has thereby unlawfully, carelessly, recklessly and negligently attempted to use said Forge street sewer as a main sewer, and has thereby unlawfully, carelessly and negligently overcharged said Forge street sewer, so that the same is wholly inadequate to safely carry the great volume of additional water and sewage discharged therein; said Forge street sewer itself being at no time more than sufficient in size to drain the abutting property on said street.

And the plaintiff further says that the sewer so unlawfully added to and carelessly drained into Forge street sewer and connected therewith, are all 8 inch sewers, and are described as follows (and then he follows with a description of three sewers, which he says are discharged into the Forge street sewer west of his premises where the grade to the east is steep, whereas east of his premises it is much less steep); and he says that after the construction of all of said sewers, said Forge street sewer being overcharged and overloaded, that on or about August 15th, 1906, by reason of the wrongful acts and negligence and carelessness of said defendant as aforesaid, the water, filth and sewage in said Forge street sewer backed up and was forced back through the connections of plaintiff's property therewith, so that said

plaintiff's property and the cellars of his said dwelling-house, he having described therein the dwelling-house on his property, were filled with sewage, etc., whereby, he says, they were greatly injured; and he says the defendant unlawfully, carelessly and negligently failed and refused to relieve said Forge street sewer from its overcharge of water and sewage so unlawfully and negligently forced therein. He goes on then further and says that the plaintiff became aware of this condition of his property by reason of the acts already charged, and that it undertook to repair the sewer, failed to make such repairs as would cause the sewer to properly discharge, but that it backed up and broke the traps, and that the water and sewage again flowed back into his premises and upon them, and thereupon caused noisome smells from the sewage in the cellar of the plaintiff's house and greatly injured the plaintiff, rendering the property unfit to use.

The defendant claims, first, it was not required by law to adopt a system of sewerage before constructing said Forge street sewer, and, hence, the charge in the petition in that regard can not render it liable for damages resulting for such want of a system. This contention of the city is borne out by the statute, Section 1536, sub-section 251. The caption of the section reads:

“Council may provide for the construction of sewers without adopting any plan of sewerage, or dividing such city into districts.”

The reason and application of this is well pointed out in the case of *Hartwell v. Railroad Co.*, 40 O. S., 155.

The second claim on the part of the defendant is that it is not liable in damages because the sewer constructed by it is inadequate to the uses to which it is put. In support of this proposition it cites the case of *Springfield v. Spence*, 39 O. S., 665. I think I will not take up the time to read that case or any part of it. Counsel in the case are entirely familiar with it, but, as we think, it is not parallel or near akin to the case now before us. In that case the matter under discussion and that for which damages was claimed was the failure of the city to properly dispose of surface water, but that the property of the plaintiff had been inundated by the surface water, his lot being lower

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than the grade of the street and the surrounding lots. So also is the case of the *City of Hamilton v. Ashbrook*, 62 O. S., 511. The circumstances of that case were altogether different from this. There it was the use of a natural stream, water being thrown into it. An examination of that case, we think, will satisfy one that it is not applicable here.

If the plaintiff is entitled to recover in this case it is because of the acts of the city, not in the construction of the Forge street sewer, but in the overloading of such sewer by constructing other sewers leading into it to provide for the sewerage of other territory not contemplated in its original construction, and in making its repairs on such sewer in so faulty a manner that the sewage was thrown upon the plaintiff's premises, bringing about the injuries of which he complains. That it is liable for these injuries seems so thoroughly in consonance with right as to commend it to the judgment of the court; and, as we see it, is supported by high authority. See *Hart v. Neilsville*, a Wisconsin case reported in 1 L. R. A. (N. S.), 952. I will not stop to read it. Counsel are familiar with that, as it was cited to us. We think it is thoroughly in point. See also *City of Terre Haute v. —*, an Indiana case reported in the 30 N. E., 686. See 2 *Dillon's Municipal Corporations*, Sections 1042-1051. Section 1049 reads:

"In accordance with the above distinction between legislative or judicial duties on the one hand and ministerial duties on the other" (a distinction plain in theory, but oftentimes difficult of application to particular cases).

And I may stop here to say that the allegation in the petition to which attention has already been called that the city adopted no system of sewerage, and the proposition further stated, that under the statute, it is not bound to do it, is applicable here to this extent, that the very fact that it did not do it, shows that it was not acting in a judicial capacity. It is when it acts judicially by the adoption of a system, it is when it acts by the adoption of a system that it is said to act judicially, and that, therefore, an action can not be maintained because of a judicial mistake.

"A municipal corporation is liable for negligence in the ministerial duty to keep its sewers (which it alone has the power to

control and keep in order) in repair, as respects persons whose estates are connected therewith by private drains, in consequence of which such persons sustain injuries which would have been avoided had the sewers been kept in a proper condition. If the sewer is negligently permitted to become obstructed or filled up, so that it causes the water to back-flow into cellars connected with it, there is a liability therefor on the part of the municipal corporation having the control of it, and which is bound 'to preserve and keep in repair erections it has constructed, so that they will not become a source of nuisance' to others. The work of constructing gutters, drains and sewers is ministerial, and when, as is usually the case, the undertaking is a corporate one, the corporation is responsible in a civil action for damages caused by the careless or unskillful manner of performing the work."

I will not stop to read Section 1051, but it will be found in point, and as we think, sustaining the claim of the plaintiff here.

From what has been said and from the authorities cited, we reach the conclusion that the second amended petition in this case states a cause of action in this—it avers that the city had not adopted a system of sewerage, and therefore, could not escape liability because it had acted judicially in adopting such system, and the allegation of the failure to adopt a system, though as already pointed out, it constitutes no ground for complaint, it removes from the city the defense that it was acting under a system, and therefore, acting judicially, or rather that it acted judicially in adopting a system, and therefore, can not be liable because of its judicial mistake. It would have been probably as well to have omitted this from the petition, and then left the defendant, if it could do so, to have plead as a defense that its work was done under an adopted system. If the averments of the petition are true, it had turned into the Forge street sewer from three other sewers, which it was entirely unable to take care of and for which it was not intended it should care for, and thereby had brought about an injury to the plaintiff which the defendant should have foreseen. In addition to this, when knowledge was brought home to it of the evil effects of this action, it wholly failed to remedy the defects in any adequate manner. The result is we find that there was error in the action of the court as hereinbefore stated, and the judgment is reversed and the case remanded to the court of common pleas.

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**EFFECT OF BANKRUPTCY OF A JUDGMENT DEBTOR UPON
OTHER JOINT DEBTORS.**

Circuit Court of Lorain County.

JAMES B. SEWARD, ADMINISTRATOR, v. FRANK R.
FAUVER ET AL.*

Decided, September 28, 1910.

*Joint Judgment Against Three—Bankruptcy of One—Revivor Against
Other Two.*

In proceedings to revive a joint judgment against three makers of a promissory note, the discharge in bankruptcy of one of them from his indebtedness thereon is no defense to a revival of the judgment against the other two, notwithstanding the debt was not proved up in the bankruptcy proceedings, there being no assets of the bankrupt for distribution to his creditors.

Fritz Rudin, for plaintiff.*F. M. Stevens*, contra.

MARVIN, J.; WINCH, J., and HENRY, J., concur.

This case is here on appeal. The facts are that on the 5th of March, 1906, George H. Arnold recovered a judgment in the court of common pleas of this county against all three of these defendants. No part of that judgment has ever been paid, and, Arnold having died, the administrator of his estate brings this suit to have judgment revived in his name.

The judgment was founded upon a promissory note, which reads:

“ELYRIA, O., June 8, 1904.

\$2,800. January 1st, 1907, after date, we promise to pay to the order of George H. Arnold twenty-eight hundred and no 100 dollars. This note does not draw interest. Value received.

“JOHN C. KOEPKE,

“FRANK R. FAUVER,

“ROLLIN H. SPRAGUE.”

On the 9th day of November, 1907, the defendant, John C. Koepke, upon proper proceedings and upon his own petition,

*Affirmed without opinion, *Fauver v. Seward*, 85 Ohio State, 466.

was discharged in bankruptcy in the District Court of the United States for the Northern District of Ohio. This judgment was included in the schedule of debts filed in the bankruptcy proceedings, so that Koepke was discharged from this indebtedness by such proceeding. The claim was not proven in the bankruptcy proceedings. The schedules in bankruptcy showed, however, that the bankrupt had no assets other than such as were exempt by law and he made his claim for exemptions, which were allowed; so that the proving up of any claim in the bankruptcy proceedings would have been a vain thing, the schedules themselves showing there was nothing with which to pay anybody.

The defendants Fauver and Sprague claim to be discharged, because they say that the discharge of Koepke was a discharge and release of them, and they make in their brief and in oral argument the claim that this was a joint note and not joint and several, and that the judgment in any event was a joint judgment, and that it being a joint judgment, not joint and several, the discharge of the one discharges all, and in any event that they are only liable for an aliquot part of the indebtedness; and they cite some authorities which, at least, it is claimed sustain them in this. But we regard it as absolutely indifferent whether this note made a joint and several indebtedness or a joint indebtedness; the judgment was a joint judgment, and that is what is sought to be revived.

It is said that the release was a voluntary release and is that kind of a release, of course, which they claim would be a release of them, because no proof was made in the bankruptcy proceeding of this debt; but we think this matter is absolutely and completely settled by the bankruptcy statute itself as it reads in plain words and as it has been construed by the Supreme Court of the United States.

In the case of *Abendroth v. Van Dolson*, 131 U. S., 661, reading from the opinion on page 7, the court say:

“The only remaining point relied on by plaintiff in error as a ground for reversal of the judgment below is, that the defendants were sued in the action as general partners, and the judgment in favor of the plaintiffs determined that they were

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general partners; and that the adjudication in bankruptcy of Griffith and Wandram was a judgment against the two partners, which is a bar to any action subsequently brought by the creditors against the two defendants as such general partners. Against this view there is, we think, an insuperable objection. By Section 5118 of the Revised Statutes, formerly Section 33 of the act of March 2, 1867 (and which is now Section 16 of the Bankruptcy Act of 1898), the rule of the common law, as declared by the court in *Mason v. Elred*, 6 Wall., 231, that a judgment upon a contract, merely joint, against one of several persons, bars an action against the others on the same contract, is rendered entirely inapplicable to adjudications in bankruptcy. That section provides: 'No discharge shall release, discharge or affect any person liable for the same debt for or with the bankrupt, either as partner, joint contractor, indorser, surety, or otherwise.'

"If the discharge of the two bankrupt partners, which is the final judgment in the proceedings, can not estop the creditor from afterwards setting up the liability of the third partner for the joint debt, clearly the other and previous adjudication in the course of the proceedings can not be held to have that effect. Though the action in the court below was brought against the three defendants, the jury was directed by the court to render its judgment against Abendroth alone, and the judgment was entered up against him alone, thus fully recognizing the validity and force of the adjudication of bankruptcy of the other two partners."

Applying that to this case, and the language can not be stronger than the language of the act itself, that it shall in nowise affect any release of any joint debtor, the judgment of the court will be that the judgment sought to be revived is revived as against Fauver and Sprague.

**INJUNCTION AGAINST ADDITION TO PERSONAL PROPERTY
TAX RETURN.**

Court of Appeals for Lawrence County.

THE FEARON LUMBER & VENEER COMPANY v. ARNO C. ROBINSON.
AS AUDITOR OF LAWRENCE COUNTY, OHIO.

Decided, December 12, 1913.

Taxation—Appeal to Tax Commission—Not a Necessary Prerequisite to Injunction Proceedings against an Arbitrary Addition to Tax Return—Levy Not Complete, When—Duty of Board of Review with Reference to Returns of Corporations—Sections 2583 and 5592.

1. When a tax-payer claims that a city board of review has made an addition to his tax return arbitrarily and without evidence, it is not necessary to appeal to the tax commission of Ohio before plaintiff can bring suit to enjoin the levy of such addition.
2. When the county auditor has placed such addition on the treasurer's duplicate, but not on the original tax list provided for by Section 2583, General Code, the levy is not complete and the auditor may be enjoined.
3. The language "any list returned under oath" as used in Section 5592, General Code, comprises the return of corporations as well as individuals, and before adding to the tax return of a corporation the board of review must comply with the provisions of such section.
4. A statement on the journal of the board of review in these words: "The board devoted the day to reviewing the personal returns of the various lumber companies and made additions as shown, the Fearon Lumber Company on own statement and information, add item 12a \$24,647," is not such a statement as required by Section 5592, General Code.

Appeal from the Common Pleas Court of Lawrence County, Ohio.

September 29, 1911, the plaintiff, an Ohio corporation, brought suit against the auditor of Lawrence county to enjoin him from adding \$24,647 to the personal property return of the plaintiff made by it to such auditor May 27, 1911, and from entering said sum against it on the tax list and duplicate of said county. Plaintiff avers that it made a true and correct return, under

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oath, of all its property which could be legally charged against it under item 12b, "average value of all articles on hand during the year or part thereof, previous to the first of April, 1911, which have been by me manufactured or changed in any way, either by combination, rectifying, refining or adding thereto" in the sum of \$34,104; that the board of review of the city of Ironton, Ohio, without any notice to the plaintiff to show cause why the valuation of its property should not be increased or without making any statement of the facts upon which such addition was made and without evidence, except the tax statement of the plaintiff, added to the return of plaintiff, under item 12b \$24,647; that the said addition was made arbitrarily and illegally.

It appears from the evidence that the suit was brought before the addition was placed upon the tax list but after it had been placed upon the treasurer's copy.

Jed B. Bibbee, for plaintiff.

Timothy S. Hogan, Attorney-General, *Clarence C. Laylin*, *Arno C. Robinson* and *L. K. Cooper*, contra.

SAYRE, J.; WALTERS, J., and JONES, J., concur.

The questions for determination arise upon the following propositions contended for by counsel for the defendant:

(a) The Tax Commission of Ohio had power and authority to afford plaintiff complete relief, and without appealing to said commission the tax-payer has no standing in a court of equity.

(b) The addition in this case having been made and entered on the duplicate of the county treasurer, the auditor can not be enjoined in this action.

(c) That the board of review is not required to comply with Section 5592, General Code, in adding to the return of a corporation.

(d) That the statement made by the board of review was sufficient if compliance with Section 5592 is necessary

As to the first contention, the decision of the Court of Appeals of the First District in the case of *Standard Oil Co. v. Hopkins. Trcas.*, reported in Vol. 18 C.C.(N.S.), is approved and followed in the case under consideration.

The syllabus in that case is:

“Injunction against collection of taxes is the proper and only remedy to review a board of review’s action in ‘arbitrarily and capriciously’ and without evidence or information adding to tax returns; act 102 O. L., 224, makes no provision for review by the state tax commission by error or appeal.”

Can the auditor be enjoined, it appearing that the addition made by the board of review was placed on the tax duplicate of the treasurer but not on the original tax list before the suit was brought and the preliminary injunction secured?

Section 2583, General Code, provides that:

“The county auditor shall make, in a book prepared for that purpose, in such manner as the state auditor prescribes, a complete list or schedule of all the taxable property in the county.”
* * *

Section 2584 provides:

“In making the original tax list, the county auditor may place.” * * *

Section 2588 reads, in part, thus:

“From time to time the county auditor shall correct all errors which he discovers in the tax list and duplicate. * * * If the correction is made after the duplicate is delivered to the treasurer it shall be made on the margin of such list and duplicate without changing any name * * * in the duplicate as delivered or in the original tax list, which shall always correspond exactly with each other.”

Section 2589 provides:

“After having delivered the duplicate to the county treasurer for collection,” etc.

From these sections it will be seen that the original is the tax list prepared by the auditor and kept in his office. The duplicate is the copy thereof delivered to the treasurer. These two words, “tax list” and “duplicate” are used interchangeably.

Whatever may be the practice of county auditors in making up these books it seems to us that the levy is not made until

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the addition is placed on the tax list. The statute provides that the tax list and duplicate shall always correspond exactly with each other. Since the addition made by the board of review has not been carried on the auditor's tax list the levy is incomplete. Something remains to be done by the auditor, which the law requires, before the duplicate is turned over to the treasurer. Since something remains to be done by the auditor, which he must do, an injunction will lie.

This holding is not in conflict with *Jones v. Davis*, 35 O. S., 474, as in that case the word "duplicate" was used, as it often is, to include "tax list" as well.

Is it necessary for the board of review or the board of equalization, in increasing the value of the property of a corporation, to comply with Section 5592, General Code?

It is the contention of counsel for defendant that the language of Section 5592, "any list returned under oath," means a return by an individual and does not include the return of corporations; and as reflecting on this matter the language, "whether the return is made upon oath of each person or upon the valuation of the assessor or county auditor," found in the last clause of Section 5591, shows that returns or valuations are limited to those under oath (individuals), those by the assessor (in case of refusal, neglect, etc.), and those by the county auditor (corporations) because of the last amendment to Section 5405 authorizing the auditor to ascertain and determine the valuation of the tax returns of corporations.

An examination of the history of Sections 5592, 5591, 5375, 5391, 5404 and 5405, will aid in arriving at a correct understanding of the language now found therein.

"Each person required by this act to list property shall make out and deliver to the assessor, when required, or within ten days thereafter, a statement verified by his oath or affirmation, of all the personal property * * * in his possession."
* * * S. & C., 1442, Section 4, now 5375, General Code.

The return of corporations for taxes was made to the county auditor and it was required that the president, secretary or principal accounting officer should list for taxation all the per-

sonal property of the corporation "verified by oath or affirmation of the person so listing." S. & C., 1446, Section 16, now Sections 5404 and 5405.

In the case of refusal or neglect, absence or sickness of any person to list personal property the assessor was to ascertain the value of the personal property of such persons and return the same to the county auditor. S. & C., 1447, Section 18, now Sections 5391 and 5392.

The annual county board of equalization, composed of the county commissioners and county auditor "shall have power * * * to equalize the valuation of all real and personal property, moneys and credits within the county." * * * S. & C., 1456, Section 44, now Section 5580.

"And said board shall have power to add to or deduct from the value of the personal property * * * of any person returned by the assessors or which may have been omitted by him * * * or to add other items upon such evidence as shall be satisfactory to the said board, whether such return be made upon oath of such person or upon valuation of the assessor; but when any addition shall be ordered to be made to any list returned under oath a statement of the facts on which said addition was made shall be entered on the journal of the board." * * * S. & C., 1457, Section 45, now Sections 5591 and 5592.

It might be concluded from reading the language last above quoted that the annual board of equalization could only add to or deduct from the valuation of personal property returned by the assessors and had no authority to change the valuation of the property of a corporation returned to the auditor. But the language of S. & C., 1456, Section 44, that the board "shall have power to equalize the valuation of all real or personal property, moneys and credits within the county," which must be construed with the language of Section 45, makes it clear that the board had authority to add to or deduct from the return of a corporation, despite the language "returned by the assessors," as found in Section 45.

It will be seen, therefore, from the language above quoted (S. & C., Section 4, p. 1442, and Section 16, p. 1446) that individuals and corporations both made returns under oath,

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although one return was made to the assessor and the other to the county auditor, and one kind of return was made by the assessor (Section 18, p. 1447) in case of refusal, neglect, absence or sickness.

There were, therefore, two classes of personal property valuations to be added to or deducted from by the board of equalization: one, in which the return was made under oath, and this included both individuals and incorporated companies; and the other, upon the valuation of the assessor in case of refusal, neglect, absence or sickness.

The language above quoted from S. & C., p. 1457, Section 45, became part of Section 2807 of the Revised Statutes and was amended March 19, 1880 (O. L., 77, p. 76) to read, in part, as follows:

“And they shall have power to add to or deduct from the valuation of the personal property of any person, firm or corporation returned by the assessor, upon such evidence as shall be satisfactory to the said board, whether said return be made upon the oath of such person or upon the valuation of the assessor * * * but when any addition shall be ordered to be made, whether to a list returned under oath or upon an original assessment, a statement of the facts on which such addition was made shall be entered on the journal * * *; and when any reduction shall be ordered to be made in the amount of personal property * * * of any person, firm or corporation a statement of the facts on which such reduction was made shall be entered on the journal of the board.”

It will be observed that the Legislature here authorized two returns of valuation, one under oath and the valuation of the assessor.

Section 2807 was again amended April 13, 1880 (O. L. 77 p. 191).

It there became part of an act to amend Sections 2766, 2806, and 2807. In that act, by Section 2766, the auditor was authorized “to fix the total value of shares of” certain banks. By Section 2806 the auditor was directed to lay before the board of equalization “copies of all reports made by cashiers of banks * * *. together with the value of the shares of such banks as fixed by the auditor and the returns of the assessor for the current year.” * * *

Section 2807 was amended to read, in part as follows:

“The said board shall hear complaints and equalize the assessment of all personal property * * * returned for the current year by the township assessors and the shares of the several banks as fixed by the auditor; and they shall have power to add to or deduct from the value of the shares of such banks as fixed by the auditor or of the personal property * * * of any person returned by the assessor * * * upon such evidence as shall be satisfactory to said board, whether said return be made upon the oath of such person or upon the valuation of the assessor or upon the valuation of the auditor; but when any addition shall be ordered to be made to any list returned under oath a statement of the facts upon which such addition was made shall be entered on the journal, and when any reduction shall be ordered to be made in the personal property * * * or the shares in any bank, whether said return be made by such person or by the assessor or by the auditor, a statement of the facts upon which such reduction was made shall be entered on the journal of the board.”

The amendment just referred to authorizes the auditor to fix the valuation of shares of banks, and the statute, as so amended, provides for three valuations, three returns; valuations or returns under oath, by the assessor, and by the auditor. The valuations made under oath included all valuations except those made by the assessor or auditor.

It will be further observed by this last amendment that only when an addition is to be made to a list returned under oath is the board required to enter a statement of facts on the journal. The language “or upon an original assessment,” found in the amendment of March 19, 1880 (O. L., 77, p. 76), is taken out.

The three sections, 2766, 2806 and 2807, were again amended by the act of March 9, 1883 (O. L., 80, p. 54), and Section 2807 was amended so as to read as it does at the present time with the exception of the language requiring the notice to the taxpayer and the hearing by the board of equalization.

Section 2766, Revised Statutes, became Section 5412, General Code, and the auditor transmits to the tax commission of Ohio the report of the banks (Section 5603), and that commission

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examines the valuation of the auditor (Section 5604) and may increase or decrease the value of the shares (Section 5605).

However, since the act approved April 12, 1911 (O. L. 102, p. 60), amending Sections 5404 and 5405, the auditor of the county, by the provisions of Section 5405, determines the valuations of all incorporated companies except those specially provided for, and thus there are still valuations by the county auditor.

But the language of the last part of Section 5591, referring to the valuation of the county auditor, was not placed there because of the amendment of April, 1911 (O. L., 102, p. 60), for that language has been in the statute, just as it is now, since April 13, 1880. So if that language meant what we construe it to mean before the passage of the act of April, 1911, it certainly did not change its meaning when that act was passed.

Ever since the enactment of the act of May 11, 1878 (O. L., 75, p. 438, Section 1, now Section 5320), the word "person," as used in the taxing laws, including Sections 5591 and 5592, is held to include firms, companies, associations and corporations.

So it is necessary, since 1878, to read into the statute law, which is now Sections 5591 and 5592, the words "firms, companies, associations and corporations" after the word "person" where the same is found in said statutes.

If so read the pertinent parts of the two sections would appear as follows:

Section 5591. " * * * It may add to or deduct from the valuation of personal property or moneys or credits of any person (firm, company, association and corporation) returned by the assessor or county auditor, or which may have been omitted by them, or add other items upon such evidence as is satisfactory to the boards, whether the return is made upon oath of each person (firm, company, association and corporation) or upon the valuation of the assessor or county auditor."

Section 5592. "When an addition is ordered to be made to any list returned under oath a statement of the facts upon which such addition was made shall be entered on the journal of the board. No such addition shall be made to such list returned under oath without the board having first given reasonable notice to the person or persons (firm, company, association and corporation), if their residence is within the county

* * *. When a reduction is ordered to be made in the amount of personal property or moneys or credits of any person (firm, company, association and corporation), whether such return is made by such person (firm, company, association and corporation) or by the assessor or county auditor, a statement of the facts on which such reduction was made shall be entered on the journal of the board."

It is therefore clear that the language "any list returned under oath" found in Section 5592, comprises lists returned by corporations as well as individuals.

It is, therefore, necessary when the board of review or equalization orders an addition to the return, either of an individual or firm, company, association or corporation, to cause a statement of the facts upon which such addition was made to be entered upon the journal and to give notice of the time and place to be fixed by the board when the tax-payer may show cause why such addition should not be made.

Was a statement of the facts, as required by Section 5592, made by the board of review on its journal in this case?

A compliance with this statute is mandatory and an addition without such compliance would be void. *Ratterman v. Niehaus*, 4 O. C. C., 502; *Hayes v. Yost*, 4 O. C. C. (N. S.), 455.

The entry on the journal is as follows:

"The board devoted the day to reviewing the personal returns of the various lumber companies and made additions as shown, the Fearon Lumber Company on own statement and information, add item 12a \$24,647."

In the case of *Fratz v. Meuller*, 35 O. S., 397, the entry on the journal was:

"On motion, the amount set opposite the names of the following persons was added to their personal returns, for the reason that the amount returned by the parties respectively was, in view of the facts, considered insufficient and below the actual value of the property owned or held by the parties: Ward 19, John W. Meuller, 425 Front street, Item 10, \$1,000."

The Supreme Court held that this entry was sufficient. That the monthly average was insufficient and below the actual value,

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was the statement of an ultimate fact on which the addition was made, and this was all that was required.

When the words are transposed and it is made as readable as possible, the statement in the case under consideration would be about this: "The board made an addition in the sum of \$24,647 to item 12a of the return of the Fearon Lumber Company on its own statement and information." Reduced to a simple and exact expression the statement is, that the addition was made on the evidence received by the board. What fact, if any, appeared from the evidence which led the board to make the addition is not stated. There is no statement of any ultimate fact. There is no reason assigned or given for the increase in the valuation of the property returned, if the valuation was increased; nor is there a statement of the addition of property not returned, if such property was added by the board. It is too plain for further discussion that there was here no statement of the facts as required by the statute. *Ratterman v. Niehaus* and *Hayes v. Yost, supra*.

There will be a decree as prayed for, the defendant to pay the costs.

**CHARGE TO JURY MAY BECOME CONCLUSIVE EVIDENCE OF
ISSUES IN CASE.**

Circuit Court of Lorain County.

THE CITIZENS GAS & ELECTRIC CO. V. CITY OF ELYRIA.*

Decided, September 28, 1910.

*Municipal Corporations—Recovery Against Gas Company, for Judgment
for Damages Against City—Evidence as to Issues in Original Case
—Charge of Court.*

In an action to recover the amount of a judgment recovered against it, which it has paid, brought by a municipal corporation against a gas company holding a franchise from it authorizing it to lay pipes in the streets of the municipality and furnish gas to its inhabitants, by the terms of which franchise the gas company agreed to defend all actions brought against the municipality for damages resulting from its excavations in the streets, and pay all judgments against the city for such damages, where the issue between the gas company and the city is whether the judgment against the city was for damages resulting from the sole negligence of the gas company in leaving unguarded an excavation in the street made by it, or for independent negligence of the city in some other respect, the charge of the court in such former action with respect to the issue submitted to the jury therein is conclusive evidence with respect thereto, no matter what evidence was permitted to be introduced in the case.

*S. M. Douglass and Geo. H. Chamberlain, for plaintiff in error.
H. A. Pounds, contra.*

MARVIN, J.; WINCH, J., and HENRY, J., concur.

This is a proceeding in error seeking to reverse the judgment of the court of common pleas in an action in which the city of Elyria was plaintiff and the Citizens Gas & Electric Company was defendant.

The petition in this case avers that a man by the name of Busswell obtained a judgment against the city of Elyria for injuries sustained by reason of a defect in the street caused by

*Affirmed without opinion, *Gas Co. v. Elyria*, 85 Ohio State, 472.

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the defendant, the Citizens Gas & Electric Co., and it says that the gas and electric company put in its pipe and the like under a franchise granted to it by the city and accepted by the company, which franchise contained the following:

“The said Citizens Gas & Electric Company, its successors and assigns, shall further fully protect and save the city of Elyria harmless from any or all claims of damages, losses, costs, charges and expenses of every nature and kind made, suffered or incurred in any manner by reason of, or connected with the use and occupation of said alleys or streets, or resulting from the excavation of any such alleys or streets; and in case the said city shall be compelled to pay any person, persons, company or corporation for any loss, injury or damage of person or property as aforesaid, the same shall be fully paid or reimbursed to said city, with all the costs and expenses connected therewith or arising therefrom, and the same shall be binding upon said company, its successors and assigns; said company, its successors and assigns, shall hold the city of Elyria free, harmless from the payment of any judgment rendered or claims described herein, and further said company, its successors and assigns, shall defend each and all law suits wherein the Citizens Gas & Electric Co. its successors and assigns, is the real party in interest, although the city of Elyria is or may be the nominal party in interest, done, caused or instituted by reason of the construction, operation and maintenance of said mains and pipe.”

The petition further alleges that the man injured, Busswell, brought suit against the city of Elyria for the injuries received by him on account of his wagon getting into a trench that was dug by the gas company, that the gas company was notified and appeared and aided in the defense, that there was a recovery against the city of \$300 damages, that the gas company has refused to pay it and the city has been obliged to pay it, together with the costs, and seeks a judgment against the gas company.

The gas company answered admitting it accepted the franchise and that Busswell commenced an action in the court of common pleas against the city of Elyria for certain personal injuries sustained, and among other things:

“Avers the fact to be that said Busswell alleged that several weeks previous to the date of his injury, the defendant permitted the Citizens Gas & Electric Company to dig up said avenue by

excavating certain trenches in said street, and also, negligently left said trench open and unfilled, without placing thereon any danger signal whatever.

“Said defendant admits that notice was given to it that said Busswell had commenced said action referred to against said city; that this defendant appeared and aided the city of Elyria, sole defendant, in the defense thereof. It further admits that upon the trial of said cause in said court, that a verdict was rendered in favor of said Busswell in the sum of \$300, and that judgment was rendered thereon, together with costs, and, as it is informed, that the city of Elyria, against whom said judgment was rendered, paid the same as averred in its petition; and said plaintiff further answering denies each and every other allegation in said plaintiff’s petition contained.

“Said defendant further answering, says, that in said action by Henry Busswell against the city of Elyria mentioned in said plaintiff’s petition, that plaintiff averred that the defendant charged was with the care, supervision, and control of all the streets and public highways within the limits of said municipality, and that it was the duty of said city to keep said streets and highways open.”

I will not stop to read the balance of the answer. The substance of it is that the suit was brought against the city charged not only negligence for failure to keep this trench, which was opened by the gas company, in such repair as that the street could be used, but that the city was further negligent in the care of that street and failed to perform its duty as charged in the original petition, and the defendant says that the result was, not the jury found, as alleged in the petition, that Busswell was injured because of the negligence of the gas company alone, but that it might have found, as in fact it did find, that the city was liable because of other negligence than that of the gas company.

We were not favored with an oral argument on the part of the plaintiff in error, but we were furnished yesterday with a very full brief on the part of the plaintiff in error, which we have examined and which we find not of special aid to us. We have examined it and find this so because it is based upon a wrong theory of the situation.

Counsel for plaintiff in error claims in his brief that it was not determined in the former action that it was the negligence of the

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gas company that brought about the injury, but that from what appears in that case it is clear that there was other negligence on the part of the city for which a recovery might well have been had, and the argument is that if the city and the gas company were both negligent and a recovery is had against the city, it can not under its franchise call in the gas company to respond. That is completely answered by the charge of the court in the case showing just what issue was submitted to the jury in the former case. I read from the charge these words:

“It is alleged in the petition and conceded by counsel for the plaintiff that there can be no recovery in this case unless it is proven and shown to you by a preponderance of the evidence that the negligence complained of is the negligence of the Citizens Gas & Electric Co. in digging a trench for gas mains in the street and not properly filling that trench. That is the first thing that is alleged. I say to you on that subject that unless you do so find that the trench in question which it is alleged caused the injury to the plaintiff was dug and left without being properly filled by the Citizens Gas & Electric Co. your verdict must be for the defendant, for plaintiff would then have failed in proving to you one of the essential and material allegations of the case which it is necessary for him to prove in order to recover.”

And again, the court emphasizes this in these words:

“So that if you so find, then the plaintiff would be entitled to recover, if you find this further fact that is essential and necessary; that this negligence of the gas company, which I have supposed would be the negligence of the city, in failing to properly fill the trench, directly and proximately, and without the intervention of any other independent cause, caused the injury to the plaintiff of which he here complains. If you find those two things in the affirmative by a preponderance of the evidence, then you would find for the plaintiff and he would be entitled to a verdict; while if you find either of them in the negative and find either that the gas company did not dig the trench or did not leave the same in an improper and dangerous shape so that it was negligent, then I say to you that the defendant is entitled to a verdict.”

So that the court submitted just one question and that only. and that was, was it the negligence of the gas company and of

the gas company only, that brought about the injury to the plaintiff in that case. The jury necessarily answered to the affirmative when they found a verdict for the plaintiff in that former case. That being so, the entire argument as to the evidence in that case and what is decided, is of no avail in this case, and the judgment of the court of common pleas is affirmed.

**RECOVERY FOR ASSAULT UPON THE MINOR SON OF
PLAINTIFF.**

Circuit Court of Summit County.

GOTTLIEB V. SEITZ V. AUGUST J. WITZBERGER.

Decided, April 12, 1911.

*Parent and Child—Loss of Son's Services—Wages Paid to Mother.
Yet Father May Recover—Presumption as to Emancipation—Ex-
penses of Taking Care of Injured Son—Hospital Bills.*

1. In an action by a father for loss of a minor son's services by reason of injuries inflicted upon the son by the defendant, the fact that the son, while working, paid over his earnings to his mother instead of to his father, the father, mother and son living together and constituting a single family, does not indicate that the father is not the proper party to sue for loss of earnings of the son.
2. The presumption is that a minor son living with his parents, though working for another for wages, is not emancipated.
3. A father may recover for expenses incurred for medicines, physician's services and hospital expenses made necessary in the care of his minor son, by reason of injuries inflicted upon him by the defendant.
4. The *per diem* charges of a hospital for care of minor son of the plaintiff injured by the defendant, are not to be reduced by the value of his board and lodging at home during the time he is at the hospital.

Musser, Kimber & Huffman, for plaintiff in error.

C. W. May and *A. J. Wilhelm*, contra.

MARVIN, J.; WINCH, J., and HENRY, J., concur.

This is a proceeding in error seeking to reverse the judgment of the court of common pleas.

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August J. Witzberger brought suit against Gottlieb V. Seitz, claiming damages by reason of the loss of service of his minor son, Emil Oliver Witzberger, because of injuries received by the son at the hands of Seitz in an assault and battery.

Defense was made that the son was not injured and that the plaintiff was not entitled to the services of the son in any event, and that no expense had been caused, nor loss of service, by reason of the injuries inflicted upon the son by Seitz.

The trial resulted in a verdict for \$400 in favor of the plaintiff below.

On motion for a new trial the court stated that the judgment would be reversed unless the plaintiff would remit \$75 from the amount of the judgment. This amount was remitted and judgment entered for \$325; it is here sought to reverse that judgment.

As to the question of whether the son received injuries at the hands of Seitz and thereby was unable to work for any length of time, this was submitted to the jury; the jury found that the injuries were received; that the son was thereby rendered unable to perform service, and under the evidence we are not surprised that the jury so found. It is urged, however, that the father lost nothing in the way of service of the son, who was at the time about seventeen years old, because, it is said, that the evidence shows that the wages the son earned (if he was earning wages at the time of the injury), were paid, in part at least, to his mother. This fact should have no bearing on the case. The mother seems rather to have been the treasurer of the family, and the money earned by the father, as well as by the son, was in large part, at least, paid into her hands. But even if all the son's wages had been paid into the hands of his mother instead of the hands of the father at the time he was working, so long as the father and mother lived together and the three constituted a single family, it would not indicate at all that the father was not the proper party to sue for the loss of the earnings of the son.

It is urged on the part of the plaintiff in error that since it appears that the son, who was not at the time of the trial of full

age, was then engaged in doing business on his own account, the presumption is that he was emancipated by his father before the time of this alleged injury.

This is not well taken. The presumption is the other way. So long as the son is a minor, the presumption is that his father is entitled to his earnings.

It was sought to show on the trial that the son's injuries were probably due to some hurt received by him in the playing of foot-ball.

As already said, we are not surprised that the jury reached the conclusion that he was injured at the hands of the plaintiff in error, and that his inability to work has been the result of such injuries. On the trial it appeared that the son was in a hospital at Cleveland for about sixty days, and the father was permitted to testify that he paid for a room and board at the hospital for his son while he was there \$1.25 per day. The only other expense which was made to appear in the evidence, to which the father was put, was some \$10 or \$12 for medicines and \$5 paid to Dr. Lyon. It should have been said that the petition seeks to recover not only for the loss of service of the son, but also for the expense to which the father was put by reason of the son's injuries.

The evidence as to the \$1.25 per day paid at the hospital for room and board of the son was put in under the objection of the defendant below, the court ruling at the time the evidence was introduced, that this was a proper subject for compensation. But, on the motion for a new trial, the court seems to have reached a different conclusion, and to have required the remittitur of \$75 from the verdict, because he thought that the father was not entitled to be reimbursed on account of this payment. On the part of the plaintiff in error it is urged that it can not be known that the jury found that the father was entitled to just \$75 for this account, and that, therefore, the remittitur may not have been put upon the proper basis, and that the amount for which judgment was finally allowed may be a different amount from that which the jury would have found, but for the evidence in relation to the room and board.

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It is difficult to understand how the plaintiff in error can complain in this regard. The evidence was that the son was in the hospital about sixty days at an expense of \$1.25 per day. If the jury allowed for this, it is hardly possible that it could have allowed more than \$75 and therefore the deduction made from the verdict by the court, when it entered judgment, must have relieved the plaintiff in error from any prejudice that he could have received by the admission of this evidence. We are of the opinion, however, that the evidence was entirely competent, and that if the father was entitled to recover at all in this case he was entitled to recover for this hospital expense. It is said that he ought not to recover for this because whether the son was injured or not, the father would have had to furnish him with board and a home, and that the duty thus imposed upon him as a father was not greater because of any injury which necessitated his being taken care of at the hospital. This reasoning is not sound. Though it is the duty imposed by law upon parents to furnish a home and board for his minor children, it is no part of his duty to furnish them a home and board at a hospital where the expenses are \$1.25 a day, when such hospital service is not necessary by reason of some disability of the minor, and in this case the disability of the minor was brought about by the wrongdoing of the plaintiff in error. These people were not in circumstances such as made the expense of each member of the family for room and board \$1.25 a day, at home. Every head of a family understands that probably the expenses at home would be the same whether this boy was at home or not, and that practically the room and board paid for at the hospital was just that much additional expense, caused by the injury to the boy. If the plaintiff in error thought this was too much, perhaps it would have been proper for him to have shown by the evidence what the fair expense would have been to the father to have kept the boy at his own house and thereby reduce the amount which he should recover by reason of the hospital expenses; but even if such evidence would have been admissible, it still would not render incompetent the evidence as to the hospital expenses and, in the absence of any evidence on that subject, we should not feel

warranted in reversing the case, even if the judgment included the whole amount allowed for expenses at the hospital. We suppose that the attorneys in this case and that all men who do business for others, when they are required to go from home to attend to such business, regard it as entirely legitimate that their hotel expenses shall be paid by the employer, and that none of us would regard it as a good answer against the payment of such expenses by the employer, that if the employed had remained at his home, he would have been at the expense of his board and room.

Complaint is further made that the court erred in its charge to the jury. The first statement in the charge pointed out as erroneous reads in these words:

“A parent is entitled to the services of his son, and anyone by committing an assault upon him, so that he is unable to perform any services, is liable to the parent for the service the parent has thereby lost.”

It is urged that this has no application to the present case and is misleading and prejudicial to the plaintiff in error. In the brief for plaintiff in error, it is said, after quoting from the above paragraph of the court's charge:

“The jury could infer nothing else than that the parent is always and under all circumstances entitled to the services of his son, be the son a minor or a man of mature years; be he single or a married man; be he living with the parent or be he emancipated.”

This criticism is not well founded. The court so instructed the jury as to what they should take as the law in this particular case.

Even if the jury understood this to mean what they surely did not understand it to mean (because they were men of some intelligence, undoubtedly), that every father was entitled to the services of every son, still it could not have affected or injured the plaintiff in error in this case, for it was this son, who was a minor and unmarried and lived with his father, to which they were to apply the law as given to them.

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But, it is said, that a minor may be emancipated by the father, so that the father would not be entitled to his earnings. This is true. But there was no evidence in this case tending to show emancipation of this son at the time of this injury. The evidence all tended to show the contrary.

In *Schouler's Domestic Relations*, paragraph 267a, it is said that emancipation may be by instrument in writing or by parol agreement, or may be inferred from the conduct of the parent. That at the present day a father can verbally sell or give his minor son his time, and that after payment or performance the son is entitled to his earnings; that is, after the son has paid to his father a specified amount or has performed something on his part to be performed to entitle him to emancipation, he may be emancipated. And in speaking on this subject this language is used in the same section:

"We are to distinguish between a license for a child to go out and work temporarily and the more positive renunciation of parental rights."

And again:

"All emancipation strictly so-called, is not to be presumed; it must be proved."

There is no error in this part of the charge.

It is further charged that after stating the issues the court used this language:

"That makes the issue for you to determine, first, whether there was an assault made upon the plaintiff's son, and second, whether he has sustained any damage."

The complaint as to this is, quoting from the brief of the defendant in error:

"We believe the natural and reasonable interpretation of this paragraph from the language used is that the second issue of fact is whether the minor son has sustained any damage. If this is the meaning that the jury has taken from the charge, it is clearly not the law, and when taken in connection with the second paragraph set forth, we believe was misleading the jury to the defendant's prejudice."

This criticism is not well taken. The language fairly construed means that the second issue is whether the plaintiff has sustained any damage, and this is made clear from other parts of the charge, in which the court distinctly said that there was nothing to be taken into account but the pecuniary loss of the father. In one part of the charge this language is used:

“If you find then that this was done by the defendant to the plaintiff’s son, and you further find that the plaintiff’s son was injured by reason of the assault and battery perpetrated upon him by the defendant, then you may proceed to ascertain how much the plaintiff in this case has been injured.

“Now he is entitled to only compensatory damages or for the loss he has sustained by reason of the loss of his son’s services.

“If you find for the plaintiff, you should award him compensatory damages. The mental suffering of the victim and his parents or the culpability of the defendant are not proper elements of the damage.”

Other parts of the charge are to the same effect and make it perfectly clear that it is for the damages sustained by the father and not for any damage that the son has sustained.

Various other paragraphs of the charge are complained of, none of which we find to have been erroneous or misleading.

Attention is especially called to this language, complained of by the plaintiff in error:

“You may also award him his necessary expenses, including medicines required in treating said son, to relieve him while suffering from the injuries sustained; also for medical bills which he has paid or for which he is liable, as shown by the evidence in the case.”

It is said that there was no evidence on the matter of expenses for medical bills and medicines. This is a mistake. There was evidence showing that \$10 or \$12 had been expended for medicines and \$5 for special medical attendance, and the court took especial pains to see to it that the jury should not take into account anything in regard to medicines or attendance, or anything else, except as it appeared from the evidence in the case, and said:

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“You should not go outside of the record and interject any deductions not reasonably made from the evidence and justified thereby. The testimony in the case must have furnished the data upon which you may calculate and approximately estimate the value of the services of the son in question to the plaintiff.”

We regard the charge as a whole an excellent statement of the law applicable to the case, and of the rules by which the jury should be governed.

There is no error in the record of this case to justify a reversal and the judgment is affirmed.

IRREGULAR RETURN ON A SUMMONS IN ERROR.

Circuit Court of Summit County.

NATHAN MORRIS ET AL V. THE B. & O. RAILROAD COMPANY.

Decided, April 12, 1911.

Summons on Petition in Error—Return Irregular, But Sufficient, when.

1. No amendment can be made to a summons which will falsify the sheriff's return thereof.
- 2 Notwithstanding General Code, Section 12259, provides that a summons on a petition in error to the circuit court if issued in term time shall be made returnable on a day therein named, still a summons so issued and made returnable on or before the first day of the next term of court is sufficient though irregular, and service thereof will not be set aside.

Holloway & Chamberlain, for plaintiff in error.

Allen, Waters, Young & Andress, contra.

MARVIN, J.; WINCH, J., and HENRY, J., concur.

This case is before us on a motion to set aside the service of summons issued on the petition in error.

The ground of the motion is that the summons is not in conformity with the provisions of the statute providing for such summons.

Section 12259, General Code, so far as it need here be considered, after providing for the filing of a petition in error reads:

“Thereupon a summons shall issue and be served, or publication made as in the commencement of an action. * * * The summons shall state that a petition in error has been filed in the case. If issued in vacation, it shall be returnable on or before the first day of the term of court; if issued in term time, on a day therein named.”

The summons in this case was issued on the 18th day of November, 1910, which was a day in the October term of this circuit court. The summons was made returnable on the first day of the next term of said circuit court. The return of the sheriff on the summons shows that it was served upon the attorney of record of the defendant in error on the 22d day of November, 1910. It will be noticed that the return day in the summons was made as though the summons had been issued in vacation. It will be further noticed by reading the summons that the order as to its return is directed to the sheriff. It is he to whom these words in the summons are addressed: “You will make due return of this summons on or before the first day of the next term of said circuit court.” It was suggested on the argument that possibly there might be an amendment ordered with reference to this summons, and counsel for the plaintiff in error, following such suggestion, has filed a motion asking for an amendment to the summons and suggesting that the return day be made December 1, 1910. It seems clear that no amendment can now be made to this summons which will cure any defect therein. Amendments are allowed in proceedings in court, and especially upon a return made on a summons and other writs, to conform to the facts, but here, if an amendment were made, as suggested in the motion, or any amendment which should fix a day certain for the return of this summons, we should have the curious situation of having by an order of court falsified the return of the sheriff. For the sheriff says in his return that he “served the same by handing a true and attested copy thereof with the endorsements, thereon,” etc. If the summons is changed

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to read, as suggested, this return of the sheriff would not be true, because we should have then to fix a summons, a true copy of which he did not serve on anybody. It seems clear, therefore, that no amendment can help out any defect in this summons. And this brings us to the question whether there is a fatal defect in the summons, so as to render it void. We have reached the conclusion that there is no such fatal defect. The purpose of the summons is to notify the defendant in error that proceedings have been commenced, seeking a reversal of the judgment of the court below. That is the only purpose of the summons. That notice was received by the defendant in error and received at a time sufficiently long before the opening of the next term of court to give him all the time for preparation which could reasonably be necessary.

It is suggested on the part of the defendant in error, that when the statute provides that a summons issued in term time shall be made returnable on a day certain, it necessarily means a day within the term. This is clearly not tenable, because neither the clerk nor the attorney who files the precipe for the issuing of the summons can know when the term will close. He does know, however, whether or not the summons is being issued during the term of court, and clearly the intention of the statute was to have a day certain fixed and that if that day certain should turn out to be a day within the term, the case might be ready for hearing at that time, and if that day certain should turn out to be a day after the adjournment of the term, the case would not stand for hearing until the next term, but in no event would the day for hearing be later than the next succeeding term, unless it should be that the day certain is later than the beginning of the next term.

Counsel for defendant in error call attention to Volume 20, *Encyclopedia of Pleading and Practice*, at page 1159, and to cases cited, under paragraph C, note 4, on that page. The language of the text in the citation referred to reads:

“All writs must be returnable, as provided by law, and the return day can not be extended beyond that fixed by the statute for the purpose. A writ not returnable, as provided by law, as where a less number of days intervene between its teste and the return day than the statute requires, is fatally defective.”

Many of the cases cited have been examined and in several of them it appears that the summons being considered was a summons issued by a justice of the peace in which the party is notified in the summons of when his case will be for trial; and in the other cases it is where a summons is issued upon a petition filed in a nisi prius court, where the summons indicates to the party when he will be required to answer to the petition. The summons in these cases are clearly distinguishable from the summons required to be issued by our statute in proceedings in error. No time is fixed either by the summons or by the statute for an answer to be filed. No answer is required. The defendant is simply notified that a petition has been filed, and by examining the summons he knows when the sheriff is required to make return of the writ, and thereby he knows when the case will be ready for hearing in court.

The Supreme Court of Wisconsin, in the case of *Porter v. Vandercook*, 11 Wis., 70, had this situation before it. An action was commenced in June, 1859. Summons required the appellant to answer within twenty days, whereas the statute provided that the answer should be filed within ninety days from the service of summons, and the court said in the syllabus:

“Though the better practice would be to state the true time prescribed by law for the defendant to answer the plaintiff, yet it is not error to state that the answer must be made in twenty days.”

In the opinion at page 71, it is said:

“Perhaps, the better practice is to specify in the summons the true time as prescribed by law for the defendants to answer the plaintiff. Still, this court held, in the case of *Laurence v. Brown*, decided at the January term, 1859, not reported, that the phraseology of the summons in this particular was not material; that the defendant must be presumed to know the law and the time which it gave him to answer; and that therefore a summons should not be set aside even though it did not conform to the law in that respect, and require the defendant to answer according.

“This was the extent of the decision in that case and upon so unimportant a question of practice, must be considered decisive as to the objection taken to the summons in the present

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case. The appellants undoubtedly well knew that the law gave them ninety days to answer the plaintiff and were not misled by anything which the summons contained.”

In the case of *Guion v. Melvin*, 69 N. C., 242, it is said in the syllabus:

“A summons served on a defendant commanding him to answer on a day certain, which day is less than twenty days from the time of the service, is not necessarily on that account void, and the probate judge is not bound to dismiss it. He should have allowed the defendant the time allowed by the code for an appearance.”

The court stated the case in these words, at page 243:

“The defendants appeared before the judge of probate and objected that the summons was irregular, because it commanded the sheriff to summon the defendants to answer the plaintiff on a day certain. That twenty-one days had not elapsed from the time when the summons was served on the defendants before the day set for its return. That under the code of civil procedure the defendants were entitled to twenty days, to which one day is to be added for every twenty-five miles travelled in which to answer the plaintiff, and the defendants can not be required to answer in a less time. The defendants therefore moved to dismiss the proceeding.

“The court being of opinion that the defendants could not be required to answer the plaintiff within a shorter time than twenty-one days, counting from the service of the summons, allowed the motion and dismissed the proceeding. From this judgment the plaintiff appealed.”

And in discussing the question the court at page 248 quotes the statute as follows:

“It (the summons) shall command the officer to summon the defendant to appear, etc., within a certain number of days after the service, exclusive of the day of service to answer, etc. The number of days shall in no case be less than twenty.”

And then goes on to say:

“In the present case the plaintiff made the summons returnable on a day certain, and not on a certain day after service. We do not say that this deviation from the statute form is such an irregularity as will make the summons void, although it is

always best and safest to follow the form prescribed by the code. But clearly the defendant can not be deprived of any right by such an irregularity. He is not obliged to appear until the twentieth day after service, exclusive of the day of service, and any proceeding had before that day is null and void. We think the probate judge was not bound to dismiss the proceeding for the irregularity but that he should have allowed the defendants the time allowed by the code for an appearance. As that time has long since expired, when the case is remanded to him, it will be his duty to allow them a reasonable (which will be generally twenty days) after notice of the remanding, within which to appear and answer. He will then proceed as required by law."

The reasoning of these two cases seems to us to be sound. No possible prejudice can come to the defendant in error by requiring him to appear to this summons, and whether or not it were a summons which required him to answer on a given day we should hold the summons good, we *do* hold in the present case that notwithstanding the irregularity in the summons as to the day on which the sheriff was to make return, the service will not be dismissed, and the motion to dismiss is overruled.

As to the motion made by the plaintiff in error, we suggest that it be withdrawn. If it is not withdrawn, it is overruled.

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EXPERT TESTIMONY AS TO PERSONAL INJURIES.

Circuit Court of Lorain County.

LAKE SHORE ELECTRIC RAILWAY COMPANY V. ALICE GATENS.

Decided, May 1, 1907.

Negligence—Expert Testimony—Internal Injuries—Evidence—Excessive Judgment.

1. In a personal injury damage case against a corporation, it is not reversible error to ask a physician, testifying as an expert for the defendant, if he has not frequently acted as an expert for defendant corporations.
2. It is competent to ask an expert witness in such a case, if certain injuries from which the plaintiff is shown to be suffering, could be attributed to an accident of the character claimed in the petition, if followed by other evidence tending to exclude all other possible causes than the accident itself, and tending to establish an actual causal relation between the accident and the injuries in question.
3. Where a petition alleges internal injuries generally, evidence may be received that the plaintiff suffered from pains in the head, irregular menstruation, enlarged ovaries and displaced womb.
4. A judgment for \$3,500 is too large where it is not shown that the plaintiff was permanently crippled in any manifest way, nor that there will be any great permanent impairment of her general health or incapacity in the performance of her duties.

E. G. & H. C. Johnson, for plaintiff in error.*Skiles, Green & Skiles* and *Stroup & Fauver*, contra.

HENRY, J.; WINCH, J., and MARVIN, J., concur.

The defendant in error, Alice Gatens, recovered a verdict and judgment for four thousand dollars in the court of common pleas against the Lake Shore Electric Railway Company, on account of personal injuries sustained by her while alighting from one of its cars, in which she had taken passage. The negligence alleged consists in the premature starting of the car, causing her to be thrown violently to the ground.

Among the errors alleged is, first: The overruling of an objection asked on cross-examination of an expert medical wit-

ness for the defendant below, namely, whether he had not frequently acted as an expert witness for defendant corporations. We think this does not transcend the limits of reasonable cross-examination; it implies no necessary reflection upon defendant corporations in general, nor upon the plaintiff in error in particular. It may or may not tend to weaken the testimony of an expert to elicit the fact that he has been frequently employed by others in like cases, but its force in that behalf, if any, is perfectly legitimate. A corporate defendant occupies neither a better nor a worse position than other defendants with regard to the cross-examination of witnesses which it produces, and this question does not assume anything else with regard to the defendant below.

It is complained further here that the trial judge overruled an objection to a hypothetical question addressed by counsel for the plaintiff below to one of her expert witnesses, which called for an opinion as to whether or not certain injuries, from which she was shown to have been suffering since the accident, could be attributed to an accident of that character. The witness' answer was that they could be. This question did not seek to elicit, nor does the answer disclose, whether the injuries in question probably did result from such an accident. The most that can be said is that they involve the possibility of such a causal relation. Thus limited in its scope and effect we see no valid objection to the admissibility of the evidence, if supplemented by other evidence tending to exclude all other possible causes than the accident itself, or by expert or other evidence establishing the existence of an actual causal relation between the accident and the injuries in question. The evidence on the subject would then be full enough for submission to the jury.

It is, however, insisted that the petition below fails to allege some of the injuries, as to which the medical experts were permitted to testify, and that the evidence fails to show that some of those injuries resulted from the accident in question. Particular attention is called to pains in the head, irregular menstruation, enlarged ovaries and displaced womb. Upon examination of the petition we find, however, that it does allege internal injuries, without specifying in full detail what they were,

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and the evidence discloses, although somewhat meagerly it is true, a causal relation between the accident and the internal ailments referred to., with a possible exception of the enlarged ovaries, and even these are somewhat doubtfully included by one expert among those organs, the unhealthy condition of which he ascribed to an accident of the kind and character complained of.

The extent of the injuries of the plaintiff below was sharply contested, and it is claimed here that the verdict of four thousand dollars, even as reduced below by remittitur to thirty-five hundred dollars, is still so large as to evince bias or prejudice on the part of the jury, in view of all the evidence upon the subject, and it is insisted that the damage awarded, as thus reduced, is still in excess of any amount warranted by the evidence. We have carefully read the testimony in this behalf, and we conclude that the jury were misled in this respect. We can not attribute such bias to any particular cause, although it is suggested that the repeated reference to one of the defendant's medical witnesses in the arguments of counsel for the plaintiff below, as a "company doctor," without warrant in the evidence for such characterization, might have had the effect of prejudicing the jury against his testimony; but we find that no prejudice of any kind could have arisen from this remark, for the witness referred to did not testify on the sharply contested issues, and we may remark parenthetically at this juncture, that although the repetition of the reference in question, after the admonition of the court, was improper, we do not think that it constituted such misconduct as to amount to reversible error.

Recurring to the amount of the judgment, we are unable to find from the record that the plaintiff below offered any such proof as to the extent of her injuries, as to justify the inference that she had been damaged to the extent of \$3,500. It is impossible, of course, to measure accurately in money the damage that accrues to a person injured, in consequence of impaired health, but some proportion must be admitted to exist, and should be maintained between the amount of damage referable to injuries of a permanently crippling and incapacita-

ting character upon the one hand, and the damages recoverable on account of temporary injuries and moderate impairment of health, upon the other. That this woman was severely injured we do not doubt, but she is not permanently crippled in any manifest way, nor does it appear that there will permanently be any such gross impairment of her general health or incapacity in the performance of her housewifely duties as to warrant the recovery of so large a sum. It is possible that upon a new trial and a more complete disclosure of the facts the evidence might warrant a recovery of the amount which the jury in this case awarded, but, taking the record as we have it, we find that there was error in overruling the motion for a new trial, upon the ground that the verdict was excessive, and the amount awarded indicated bias or prejudice and that the verdict in respect of the damages awarded was not sustained by the evidence, and unless the defendant in error shall remit \$1,000 from her verdict and judgment, the judgment will be reversed and the cause remanded.

PROVISION BY WILL FOR LUXURIES FOR INFIRMARY INMATES.

Circuit Court of Lorain County.

JUDSON C. STARR v. N. H. FORBES ET AL.

Decided, May 1, 1907.

Trust—To Provide Luxuries for Inmates of Infirmary—Enforcible.

A trust created in a will for the purpose of providing for the inmates of a county infirmary such luxuries as they would not have in the regular administration of the institution, is not illegal or impossible of accomplishment.

Geo. H. Chamberlain, for plaintiff in error.

E. G. & H. C. Johnson, Ingersoll, Stetson & Wilcox, F. M. Stevens and Lawrence Gillmore, contra.

HENRY, J.; WINCH, J., and MARVIN, J., concur.

This is an action by an heir at law against legatees in trust who are in possession of a fund which, it is alleged, they had no

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capacity to take. By the will of Orlene R. S. Hamilton, the residue of her estate remaining after the payment of certain other bequests, was bequeathed to the directors of the Lorain County Infirmary, and their successors in office forever, upon certain trusts for the poor of said county, who were defined to be, in a suit instituted for the purpose of construing the trust, the inmates of said infirmary. In that suit it was also decreed that the object of the trust was to provide for said inmates such luxuries as they would not have in the regular administration of that institution. Some \$3,813.17 is now in the possession of the directors of said infirmary, who are the successors in office of the persons who occupied that position at the time the will was made and the bequest paid. The estate has been fully settled, and this action is brought without making the executor a party. It is objected on behalf of the infirmary directors that they are not liable to be thus directly sued, but in the view we take of the case, it is not necessary to determine that question. The main contention is that neither Section 20, nor any other section of the Revised Statutes of Ohio, empowers infirmary directors as such, to take a legacy, or to accept or execute a charitable trust; that the testator's intention was to repose a personal confidence in those whom the people might elect to the office of infirmary director, and to those who by reason of occupying that official position would be peculiarly qualified to carry out her wishes, and that, therefore, no substitute trustees appointed by a court of equity could carry out the purpose of the will; that in any event the interference with the public administration of the poor laws and incentives offered by the trust thus sought to be created, to induce the poor to become public charges in order that they may become beneficiaries of this fund, are so repugnant to the public policy of the state as to render the trust illegal and impossible of accomplishment through any agency, official or non-official.

Upon the other hand it is claimed that the infirmary directors are within the spirit if not the letter of Section 20 of the Revised Statutes of Ohio; that no statutory authority is required to authorize public officers to administer *quasi*-public trusts; that if the infirmary directors can not take in their official

capacity, they may nevertheless take as individuals, and that in any event, if the trustees named in the will are incapable of taking, a court of equity may and should in the case of a charitable trust, appoint suitable trustees to carry out the general purpose provided for in the will.

It is perfectly manifest that the plaintiff's case must stand or fall upon its own merits. Unless the trust provided by the will is utterly illegal or incapable of enforcement by any lawful means, the plaintiff has no claim to this fund. It is not necessary for us to decide whether or not the title of the trustees who now have possession of the fund is unassailable, unless we further hold that the trust itself is void. We see nothing incompatible with the public policy of the state and with the enlightened humanitarianism which it offers, to defeat this most charitable attempt to alleviate the unfortunate condition of those who through age, sickness or other adverse circumstances become unable to support themselves, and hence a charge upon the community. This is eminently such a public or eleemosynary trust as will be enforced by a court of equity, if necessary, through a trustee of its own appointment. It is not to be supposed that the testator reposed a personal confidence in persons whom she never saw or knew, simply because they held elective office and have supervisory control over paupers. On the contrary, a court of equity must be presumed to be quite as capable of appointing a trustee who is well qualified to administer a trust of this character, as the general electorate of the county, and if necessary, such trustee can hereafter be appointed.

It follows, therefore, that the plaintiff's claim to this fund, resting as it does upon the supposed invalidity of this trust, is not well founded, and his petition is dismissed.

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**PROSECUTION FOR UTTERING AND PUBLISHING FORGED
INSTRUMENT.**

Circuit Court of Lorain County.

FRANK LIEBLANG V. STATE OF OHIO.

Decided, May 1, 1907.

Criminal Law—Affidavit of Prejudice—Misstatements of Prosecuting Attorney—Uttering and Publishing Forged Check—Similarity of Handwriting—Evidence—Accused Absenting Himself During Trial.

1. It is not error for a trial judge to disregard an affidavit of prejudice filed on the day of the trial.
2. No prejudice results from misstatements as to the crime charged by the prosecuting attorney in his opening statement of the case to the jury in a criminal case, if, after the evidence is all in the trial judge instructs the jury to consider only the evidence admitted and to disregard all statements of the prosecuting attorney with regard to evidence offered, but not admitted.
3. One who seeks to obtain money on a forged check purporting to be payable to himself, by presenting it to the bank on which it is drawn and asking that it be cashed, is guilty of uttering and publishing the forgery, though it is not until afterwards that he endorses his name upon the back of the check.
4. Circumstantial evidence may be sufficient to lay a proper foundation whereby one writing is so authenticated as to authorize the comparison therewith of another writing to show identity or diversity of authorship.
5. If, after the trial of a felony case has begun and before it is finished, the accused absent himself, the trial may continue, after forfeiture of the recognizance, and the verdict be received and recorded, but sentence can not be pronounced until the accused is in court, or is retaken.

*Anthony Neiding and Brady & Dowling, for plaintiff in error.
F. M. Stearns, contra.*

HENRY, J.; WINCH, J., and MARVIN, J., concur.

The plaintiff in error was convicted of uttering and publishing a forged instrument. An affidavit of prejudice was filed against the trial judge, who disregarded it upon the ground that it was filed immediately before the trial began and on the same day,

and was, therefore, too late. Under the recent amendment of the statute in that behalf, we think the trial court committed no error in disregarding the affidavit.

It is said that the prosecuting attorney was guilty of misconduct in his opening statement in intimating that the prisoner was guilty of attempted blackmail or extortion in connection with the offense for which he was tried. His statement was challenged at the time by the prisoner's counsel but the court overruled the objection, stating that he could not at that stage of the case determine whether evidence of these collateral matters would or would not be competent. The prosecuting attorney seems to have been acting in good faith upon the supposition that the matters in question were material, but later in the trial when he attempted to introduce evidence thereof, such evidence was excluded. The trial judge, moreover, carefully instructed the jury to consider only the evidence introduced, and to disregard all statements made by the prosecuting attorney with regard to evidence offered but not admitted. In this, we find no prejudicial error.

Another error complained of is that the forged instrument set forth in the indictment did not contain the endorsement of the prisoner's name, which appears on the back of the instrument as introduced in evidence. We think there is no material variance in this respect. The evidence shows that before the forged check had been introduced, the prisoner sought to obtain money on it by presenting the same and requesting that it be cashed. This, of itself, constitutes an uttering and publishing. The prisoner was told when he thus presented the check, which was payable to his own order, to write his name on the back of it. He turned and went a few feet away to a desk and came back after a few moments with what purported to be the same check, bearing his signature. On this state of facts it is further complained that this endorsement was determined by the court to afford a sufficient basis of comparison to admit of the introduction of evidence of a letter alleged to have been written by Lieblang, and to authenticate his handwriting thereon. Another writing proved to have been made by the prisoner was also used as a basis of comparison. It is objected, however, inasmuch as no one actual-

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ly saw the prisoner endorse the check, the circumstantial evidence that the endorsement was written by him was not sufficiently positive to make it a proper basis of comparison. We think that circumstantial evidence may, and in this case does suffice, to lay a proper foundation whereby one writing is so authenticated as to authorize the comparison therewith of another specimen of handwriting to show identity or diversity of authorship.

It is further complained that the court committed error in proceeding with the trial when, after the evidence was all in, the prisoner failed to appear at the opening of court on the morning of the last day of the trial.

Section 7301 of the Revised Statutes of Ohio provides:

“A person indicted for a misdemeanor may, upon his request in writing, subscribed by him and entered on the journal, be tried in his absence, or by the court; no other person shall be tried unless personally present; and if a person indicted escape, or forfeit his recognizance, after the jury is sworn, the trial shall proceed, and the verdict be received and recorded; if the offense charged is a misdemeanor, judgment and sentence shall be pronounced as if he were personally present; and if the offense charged is a felony the case shall be continued until the convict is in court, or is retaken.”

It is insisted that this being a case of felony there is no authority for going forward with the trial during the prisoner's absence and that the only course open in this event is indicated by the words, “The case shall be continued until the convict is in court, or is retaken.”

We think that counsel misinterpret this section. The true intent and meaning thereof is, that in the prisoner's absence a trial may not be commenced and carried on in case of felony; that it may be commenced and carried on in case of misdemeanor, upon the prisoner's request in writing, subscribed by him and entered on the journal. If, after the trial is commenced the prisoner absent himself, the trial may continue whether it be a case of felony or misdemeanor. Sentence, however, can not be pronounced in the prisoner's absence, except in case of misdemeanor.

It is further contended that even with this interpretation of the statute, the trial was erroneously proceeded with, inasmuch as it did not appear that there had been an escape or forfeiture of recognizance. It is suggested that his absence may have been due to sickness, accident, arrest, or other cause beyond his control. This, however, would not be sufficient to prevent a forfeiture of his recognizance, although it might justify the setting aside of such forfeiture thereafter. The transcript here shows that the recognizance was duly forfeited on the same day that the bill of exceptions shows the objection to the further prosecution of the trial was made and overruled. We think there was no error in submitting the case to the jury and receiving their verdict under these circumstances in the defendant's absence.

No other error in the record is alleged, and we find none. Judgment is therefore affirmed.

LEWD WOMAN HELD ENTITLED TO HOMESTEAD EXEMPTION.

Circuit Court of Lorain County.

MAUD BARNES ET AL V. H. P. GLICKMAN.

Decided, May 1, 1907.

Attachment—Discharge of Property Claimed as Exempt—Owner a Prostitute.

It is no reason for refusing to discharge an attachment of goods shown to be the property of a married woman living with her husband, neither of whom have a homestead and the goods being claimed as exempt in lieu of a homestead, that the debtor is a prostitute, plying her vocation.

Thompson, Glitsch & Cinniger, for plaintiff in error.
S. H. Williams, contra.

HENRY, J.; WINCH, J., and MARVIN, J., concur.

The error alleged in this proceeding is the failure of the court below to discharge an attachment levied upon a piano, the prop-

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erty of Maud Barnes, a married woman living with her husband, neither of whom has a homestead; the piano in question being claimed by way of exemption in lieu of homestead. All these facts are admittedly true, save that it is alleged that Maud Barnes is a prostitute, plying her vocation, and that her husband, therefore, does not live with her in the sense contemplated by the exemption statutes intended for the protection of the family.

We are not able to read into the statute any qualification of this sort, and the judgment below is reversed.

Proceeding to enter the judgment which the court below should have rendered, we now order that the attachment be and the same is discharged.

ENFORCEMENT OF RESTRICTION IN DEED.

Circuit Court of Summit County.

THE WEST HILL LAND COMPANY V. SAMUEL J. RITCHIE.*

Decided, April, 1907.

Restrictions in Deed—General Plan—Constructive Notice—Waiver.

Restrictive covenants contained in a deed in defendant's chain of title, of which he had constructive notice, which are part of a general plan or scheme of restrictions published and adhered to by plaintiff and its trustee, will be enforced notwithstanding plaintiff has offered to sell the defendant other lots in the allotment, without restrictions.

Stuart & Stuart, for plaintiff in error.

W. E. Young, contra.

HENRY, J.; WINCH, J., and MARVIN, J., concur.

We see no reason why the restrictions in the deed of defendant's grantor should not be enforced so as to prevent defendant from erecting any building nearer than the stipulated distance

*Affirmed without opinion, *Ritchie v. West Hill Land Co.*, 80 Ohio State, 722.

from the street. He had constructive notice of the restrictions when he bought. They were a part of the scheme or plan of restrictions published and adhered to by plaintiff and its trustee, Christy, who has now executed his trust by conveying the entire allotment to plaintiff. The restriction complained of is not unreasonable. There is nothing in the evidence to show that plaintiff has waived it. True, it offered to sell to defendant its entire line of lots on defendant's side of the street, without restrictions; but that does not amount to a waiver, much less to an estoppel. The plaintiff may, therefore, take a decree in accordance with the prayer of the petition.

**LIABILITY OF WIFE ON NOTE TO WHICH SHE SIGNED
HER HUSBAND'S NAME.**

Circuit Court of Summit County.

WILLIAM WALDO ET AL V. FRANK P. FULLER ET AL.*

Decided, 1907.

Promissory Note—Authority of Wife to Sign Husband's Note—Liability of Wife as Accommodation Maker.

1. Where a husband authorizes his wife to collect what is owing to him and pay what is owing by him, that does not authorize her to give a promissory note to pay part of his debts and sign his name thereto.
2. One who receives a note purporting to be the note of his debtor and the debtor's wife, to pay an antecedent debt of the husband, may enforce said note as against the wife, notwithstanding she signed her husband's name to the note without his authority, the creditor not knowing that fact.

Musser, Kohler & Mottinger, for plaintiff in error.

Esgate, Spencer & Snyder, contra.

HENRY, J.; WINCH, J., and MARVIN, J., concur.

The action below was upon a promissory note alleged to have been given by the defendants in error, who are husband and wife.

*Affirmed without opinion, *Fuller v. Waldo*, 79 Ohio State, 437.

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Plaintiffs in error were plaintiffs below and are Iowa merchants. The defenses interposed by the separate answers are: First, want of consideration. Second, that the signatures to the note are not genuine. Third, that if the wife did in fact sign her own and her husband's names, she had no authority to bind him.

The last defense affects the husband only, and as to him the judgment must be affirmed. The evidence of her agency at most amounted to a statement by him that his wife would collect what was owing to him and pay what was owing by him. This does not warrant any inference that she was authorized to sign his name to promissory notes. *Mechem on Agency*, Section 389.

As to the wife the case is different. True, the rule is that where an answer sets up two defenses, and the jury finds on the issues for the defendant, it is a finding on all the issues, and where error intervenes affecting only one of them, the verdict must be upheld (*McAllister v. Hartzell*, 60 Ohio St., 69). Here, however, we think there was error affecting both defenses interposed by the wife. An inspection of her admitted signature affixed to a deed very near the time of the note's date, together with the other evidence on the subject, compels the conclusion that her signature to the note is genuine, and we hold that in that respect the verdict is contrary to the weight of the evidence.

As to the other defense the court charged that inasmuch as the note was given for the husband's debt, if given at all, a new consideration was necessary to bind the wife upon it in the hands of the original payee. Such is not the law. See, as declaratory of the common law, Sections 3172a and 3171x, Revised Statutes.

For these errors, and these only, the judgment in favor of the wife is reversed and the cause as to her is remanded.

DE FACTO MAGISTRATE—UNDER COLOR OF OFFICE.

Court of Appeals for Harrison County.

WILBER E. SIMPSON V. GEORGE PATTON AND JAMES CARTER.

Decided, November 26, 1913.

Justice of the Peace—Validity of Judgment Rendered by De Facto Justice—Constitutionality of Act Not Assailable in Suit to Enjoin Enforcement of Judgment.

At the November election, 1907, one H was duly elected a justice of the peace for a term of four years commencing January 1st, 1908, and ending January 1st, 1912. On February 3d, 1910, H resigned as such justice of the peace and pursuant to the provisions of Section 1714 of the General Code, the trustees of the township appointed one C justice of the peace to fill the vacancy, until the successor should be elected and qualified, and the Governor issued a commission to C authorizing and empowering him to make, execute and discharge all and singular the duties appertaining to such office until his successor was elected and qualified.

At the November election, 1911, a successor was elected, who did not qualify, and C continued to act as such justice of the peace after the expiration of the term of H whom he succeeded, until April 1912, when he rendered the judgment complained of in this case.

Held: First, that in rendering the judgment complained of, C. was a "de facto" justice of the peace under color of office. Second, that the constitutionality of Section 1714 can not be questioned in an action to enjoin the enforcement of such judgment.

B. W. Rowland, for plaintiff.

D. A. Hollingsworth, contra.

NORRIS J.; METCALFE, J., and POLLOCK, J., concur.

This case is in this court by appeal. It was once decided and application made for a rehearing. The plaintiff in his petition seeks to enjoin the collection of a judgment recovered before a justice of the peace. He alleges in substance, in his second cause of action, that in the year 1907, one Samuel J. Hughes, was elected justice of the peace for Athens township, this county, for a term commencing the 1st of January, 1908, and extending for a period of four years, which would be to

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January 1st, 1912; that on February 3d, 1910, Hughes resigned as such justice of the peace, and the trustees of the township appointed James Carter, defendant, as such justice, to fill the unexpired term of Mr. Hughes, who had resigned, and that thereafter the Governor of the state commissioned Carter as such justice, under the law, for the unexpired term, until his successor should be elected and qualified, as stated in the petition.

Now, at the November election, 1911, a successor was elected for the term commencing in January, 1912, but that successor did not qualify as such justice, and Carter continued to act as justice until the following April, and the suit in question was brought before him and tried during that month. He heard the case and rendered the judgment complained of, which would be some months after the expiration of the term of Hughes, whom Carter was appointed to succeed, and to fill his unexpired term.

Now, it is claimed on the part of the plaintiff that the act of Carter in rendering such judgment was entirely void, and it raises the question as to whether or not he had a right to act as such justice, or if he had not, whether his acts were that of a *de facto* officer acting under color of office so that the judgment would be binding upon the parties. Section 1714 of the General Code, providing for appointment, reads as follows:

“If a vacancy occur in the office of justice of the peace by death, removal, absence for six months, resignation, refusal to serve, or otherwise, the trustees within ten days from receiving notice thereof, by a majority vote, shall appoint a qualified resident of the township to fill such vacancy, who shall serve until the next regular election for justice of the peace and until his successor is elected and qualified. The trustees shall notify the clerk of the courts of such vacancy and the date when it occurred.”

In pursuance of that section the trustees appointed James Carter for a justice of the peace, and the governor of the state on the fourth day of June issued a commission containing the following:

“Know ye, That whereas James Carter, of Harrison county, has been duly appointed to the office of justice of the peace, in and for Athens township, until his successor is elected and qualified.

“Therefore, By virtue of the authority invested in the Governor by the Constitution, and in pursuance of the provision of the statutes, I do hereby commission him, the said James Carter, to be justice of the peace, as aforesaid, authorizing and empowering him to execute and discharge, all and singular, the duties appertaining to said office, and enjoy all the privileges and immunities thereof.”

Now, by the statute, and by the commission of the Governor, clearly James Carter had the right to continue to act as justice of the peace until his successor was elected and qualified, and it is conceded that no successor had been elected and qualified at the time he rendered the judgment in question.

But it is said that that statute authorizing such appointment is in conflict with the provision of the Constitution of the state which limits the office of justice of the peace to four years, and that the term of Hughes, whom Carter was appointed to succeed, expired on the first day of January 1912, at the end of the term of four years; and it is, therefore, urged that this act is in conflict with the Constitution and that the question of the constitutionality of the act can be raised in this case, and that is the question before this court—whether we may pass upon the constitutionality of this act when the judgment is collaterally attacked.

Ex parte Strang, 21 O. S., 610, bears upon the question (propositions 1 and 2 of the syllabus):

“The acts of an officer *de facto*, when questioned collaterally, are as binding as those of an officer *de jure*.

“To constitute an office *de facto* of a legally existing office it is not necessary that he should derive his appointment from one competent to invest him with a good title to the office. It is sufficient if he derives his appointment from one having colorable authority to appoint; and an act of the General Assembly, though not warranted by the Constitution, will give such authority.”

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And this case had to do with the police judge in the city of Cincinnati, and in the opinion, after discussing the question, Judge White says:

"The direct question in this case, is, whether the reputed or colorable authority required to constitute an officer *de facto* can be derived from an unconstitutional statute.

"The claim that it can not, seems to be based on the idea that such authority can only emanate from a person or body legally competent to invest the officer with a good title to the office. We do not understand the principle to be so limited. We find no authorities maintaining such limitation while we find a number holding to the contrary. *Fowler v. Bebee et al*, 9 Mass., 231; *Commonwealth v. Fowler*, 10 Mass., 290.

"The true doctrine seems to be that it is sufficient if the officer holds the office, under some power having color of authority to appoint; and that a statute, though it should be found repugnant to the Constitution, will give such color."

To the same effect is the case of *State of Ohio v. Gardner*, 54 O. S., 24:

Syllabus. "In a prosecution for offering a bribe to an officer who is acting as such under a statute providing for the government of a municipal corporation, the defendant can not question the constitutionality of such statute."

There are two opinions in this case, and reading somewhat from the opinion of Judge Spear, and from the authorities cited, we find quoted from *McKinn v. Sommers*, 1 Pa., 297, this language:

"If a person usurp an authority to which he has no title, or color of title, his acts would be simply void, but a colorable title to an office can be examined only in a mode in which the officer is a party, and before the proper tribunal."

That was a case in which the officer was not a party and where his right to the office was involved, and to the same effect:

"*The People ex rel v. Weber*, 24 Ill., 184: 'Though a judge elected under a law not authorized by the Constitution, shall be ousted because he is not an officer *de jure*, yet his acts *colore officii* will be valid.'"

And, quoting from *The People, ex rel, v. Weber*, 86 Ill., 283 :

“The title of a *de facto* officer can not be inquired into in a collateral way between third parties, but it may be enquired into where he is suing in his own right as an officer.”

To the same effect is *Leach v. The People, ex rel*, 122 Ill., 420. Again quoting from the opinion :

“*Brown, Treas., v. O’Connell*, 36 Conn., 432, was an action of debt on a recognizance given in the police court of Hartford.

“The Constitution provided that all judicial officers should be appointed by the General Assembly. That body, by a statute, undertook to authorize the appointment of a judge of the police court by common council. The Supreme Court held that the appointment was void, but that the appointee ‘was a judge *de facto*’ and that a recognizance entered into before him in the police court for the appearance of a prisoner was valid and binding.”

Then quoting from the work of *Van Vleet on Collateral Attack*, page 33, we find the following :

“If it is necessary in order to guard the rights of the public, to hold the acts of an actual although unlawful incumbent of a judicial office valid, as being done by an officer *de facto*, then *a fortiori* is necessary to hold an actual judicial tribunal, erected under the forms of law, sustained by the power of the state, and settling rights and titles, a tribunal *de facto*.”

Then again :

“The *de facto* character of the officer is not impaired because he was appointed by virtue of a void statute. Thus, a judge appointed by the governor, or a city council, or transferred to another district; or a probate clerk, or district attorney, appointed by authority of an unconstitutional statute; and county officers elected in a new county before the law organizing it could take effect, are all officers *de facto*.”

Now, how stands this case, By the statute of the state, duly passed, the trustees were clothed with authority to appoint a justice of the peace to succeed Hughes, resigned, for the unexpired term, and until his successor was elected and qualified.

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In pursuance of such appointment and the Governor's commission Carter continued to act as justice of the peace, affecting the rights of litigants brought before him. He had the color of the statute and the commission of the chief executive of the state for his authority to act as such justice.

Now, it seems to us that he was acting under color of office and was a *de facto* justice of the peace at the time he rendered this judgment. We are not unmindful of the decision in the case of *Bushnell v. Koon*, 13 C. Dec., and 8 C. C. Rep., holding that acts of a justice of the peace after his term had expired was absolutely void. But we think that is clearly distinguishable from this case; he had absolutely no color of office; he was not appointed for such a period; he was commissioned for a period of four years, and his term expiring at a certain date, and after that date he assumed to continue to act as such justice of the peace. We think this case is not like that.

It follows that a decree will be entered in this case finding that the act of the justice was the act of a *de facto* magistrate, and the judgment will be sustained and the case dismissed.

**PROSECUTION FOR SALE OF INTOXICATING LIQUOR
TO A MINOR.**

Circuit Court of Summit County.

ALBERT LOWTHER V. STATE OF OHIO.

Decided, 1907.

Criminal Law—Qualification of Juror—Prejudice Against Liquor Business—Knowledge of Minority from Appearance of Prosecuting Witness—Proof of Identity.

1. In a trial for knowingly selling intoxicating liquor to a minor, the fact that a proposed juror admits that he has a prejudice against the business of selling intoxicating liquors, does not sustain a challenge for cause.
2. The claim that the evidence fails to show that the accused knew of the prosecuting witness' minority, is met by the fact that the jury saw said witness.
3. Though no one of the witnesses in a criminal case identifies the accused beyond a reasonable doubt, the collective effect of all their testimony may be sufficient to dissipate any doubt upon that subject.

HENRY, J.; WINCH, J., and MARVIN, J., concur.

Plaintiff in error was convicted of knowingly selling intoxicating liquor to a minor, in violation of Section 4364-21, Revised Statutes.

Of the claims of error urged here, only three are saved upon the record:

1. Exception was taken to the refusal of the trial court to sustain the challenge for cause against juror Walker, upon the ground of his prejudice against the business of selling intoxicating liquors. That is not a ground of challenge under Sections 5177 or 7278, Revised Statutes; and it appearing that this juror was otherwise qualified, we think the court was justified in overruling the challenge.

2. The claim that there was no proof of the plaintiff in error's knowledge of the prosecuting witness' minority is met by the fact that the jury saw him; and we can not now say from the record before us, that the inference of plaintiff in error's

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knowledge of his minority, implied in their verdict, is unwarranted.

3. The identity of the accused, it is claimed, was not established beyond a reasonable doubt, since none of the witnesses who testified on that subject identified him with that degree of certainty. The collective effect of their testimony may, however, have sufficiently satisfied the jury so as to dissipate any doubt upon that point. *Commonwealth v. Cunningham*, 104 Mass., 545; *People v. Stanley*, 59 N. W., 498; *State v. Franke*, 159 Mo., 560.

The judgment is affirmed.

**EFFECT OF FAILURE OF TAX-PAYER TO REQUEST THAT
ACTION BE BROUGHT.**

Circuit Court of Columbiana County.

W. L. SHARP ET AL V. VILLAGE OF CADIZ, OHIO, ET AL.

Decided, 1907.

Tax-Payer's Action Against Village—No Village Solicitor.

An action can not be maintained by a tax-payer against a village, under favor of Section 1536-668, Revised Statutes, where the petition fails to show a request upon the village solicitor or any other official to bring the action and his refusal or neglect so to do, even though the village has no solicitor.

HENRY, J.; TAGGART, J., concurs.

It is so perfectly manifest from the face of the petition which is filed here from the notice which was served upon the mayor and addressed to the mayor and solicitor of this municipal corporation that the notice in question referred to a proposed action by the village of another and different sort from that here sought to be enjoined as indicated by the prayer of the petition, that it becomes necessary to determine whether, under the circumstances of this case, any notice to or request of the village solicitor is prerequisite to the maintenance of an action of this character.

Ordinarily it may be said unhesitatingly that, under the statute, such request must be made and refused, or at least unacted on, before such an action as this can be maintained under Section 1778, Revised Statutes, now 1536-668. This section provides:

“In case he shall fail,” that is, the village solicitor, “upon the request of any tax-payer of the corporation to make application provided for in the preceding section, it shall be lawful for such tax-payer to institute suit for such purpose in his own name, on behalf of the corporation; provided, that no such suit or proceeding shall be entertained by any court until such request shall have first been made in writing; and further, provided that no such suit or proceeding shall be entertained by any court until such tax-payer shall upon motion of the solicitor or corporation counsel have given security for the costs of the proceeding.”

Now, it is said here, that inasmuch as there was no village solicitor, as is alleged in the petition, at the time this action was brought, no such request was possible, and therefore, no such request was necessary.

The Supreme Court has seemingly expressed itself upon this subject in the case of *Brundage v. Village of Ashley et al*, 62 O. S., 526. The syllabus of that case is:

“In an action brought by a tax-payer under Sections 1777, 1778 and 1779, Revised Statutes, where a village has no solicitor, the plaintiff is not entitled to have included in the costs allowed to him, compensation to his attorney.”

The opinion in the case is *per curiam*, and therefore is entitled to the same weight as the syllabus.

This language is used by the court:

“If there is a solicitor and no such request is made upon him, there can be no compensation for the attorney included in the costs allowed to plaintiff, and if there is no solicitor the same result must follow, because it is the request and refusal that warrants the allowance of such fees.

“The fact that there is no such solicitor does not have the legal effect to make it unnecessary to first make such request.”

Now, there is nothing in this *per curiam* which seems to modify the force and effect of that last statement. Whether

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a request made upon some other officer than the city solicitor if there be no such officer as city solicitor, would be a sufficient basis for this action, or an action of this sort or whether, upon failure of the municipal corporation to have any such officer, the statutory action provided for in these sections can not be brought at all, is another question, which it is not necessary for us to decide. Suffice it to say that no attempt was made to serve any sort of notice upon any officer of the municipal corporation in respect to the cause of action which is asserted in this petition, and inasmuch as the Supreme Court has said clearly that the service of such notice is prerequisite to the beginning of and maintenance of any such action, we fail to see how there is any proper action before us.

The petition will therefore be dismissed.

**PROCEDURE FOR ENFORCEMENT OF STATUTORY LIABILITY
OF TRUSTEES.**

Circuit Court of Summit County.

THE AKRON PRINTING & PAPER COMPANY V. SUPERIOR COUNCIL
CHEVALIERS.

Decided, 1907.

*Action to Subject Liability of Trustees of Corporation Not for Profit—
Procedure.*

An action to subject the statutory liability of trustees of a corporation not for profit, stands on the same footing as a stockholder's liability suit, and is governed as to matters of procedure by Section 3261, *et seq.*, Revised Statutes.

HENRY, J.; WINCH, J., and MARVIN, J., concur.

The parties here stand as they stood below and the error assigned is upon the sustaining of a demurrer to the petition. Upon careful consideration we think the action to subject the statutory liability of trustees of a corporation not for profit, is placed by statute on the same footing as a stockholders' liability

suit, and that it is governed as to matters of procedure by Section 3261 *et seq.* (92 O. L., 361). There are some anomalies in this practice as to joinder of causes of action and parties, but the statute must of course prevail. The demurrer should therefore have been overruled if this petition conforms to the practice thus defined, and if it presents no other defect. We think it does conform to the statute, but we have had grave doubt whether it is otherwise impervious to demurrer.

It counts upon an account stated and a subsequent open account without, however, reciting the items of the account, or making the exhibit containing it a part of the petition. It then connects the defendant trustees therewith by averring that when the "items" of said indebtedness "accrued" the individual defendants were trustees of the corporation. If this means items of the *account* there is no account pleaded and the petition is bad. If the account stated can be called an item of the indebtedness that objection is cured. If the word "accrued" means *incurred*, or *became a part of the claim asserted*, instead of *matured*, as is ordinarily its signification, that difficulty is likewise removed. It is perhaps a strained construction that will save the petition but we construe the petition liberally and hold that it states a cause of action *prima facie*.

The judgment will therefore be reversed and the cause remanded.

CITY HELD LIABLE FOR MEDICAL SERVICES.

Circuit Court of Summit County.

THE VILLAGE OF BARBERTON V. FREDERICK LOHMERS.

Decided, 1907.

Municipal Corporation—Liability for Medical Services Rendered Quarantined Small-Pox Patient.

Under favor of Section 1536-741, Revised Statutes, a physician who renders medical service to a quarantined small-pox patient, who is unable to pay therefor, is entitled to recover compensation from the municipal corporation which was promptly apprised of the situation, but took no action with reference thereto.

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HENRY, J.; WINCH, J., and MARVIN, J., concur.

This was an action to recover compensation for medical services to quarantined small-pox patients alleged to be unable to pay therefor themselves, within the meaning of Section 2128, Revised Statutes, now Section 1536-741. Plaintiff in error's board of health was promptly apprised of the situation but failed to take any action. The main question here presented is whether a cause of action arises under these circumstances against a municipal corporation by virtue of the provisions of this statute. Does the statute, of its own force, impose a legal obligation underlying the prescribed duties of boards of health in such cases, or is the affirmative action of the board of health a condition precedent to the bringing of an action of this kind? Such appears to be the test applied in construing a somewhat similar statute in *Trustees, etc., v. Ogden*, 6 Ohio, 23, in which it was held that:

"Overseers of the poor of the proper township are bound to support a casual pauper, if found within the limits of the township, and requiring support."

And that:

"Where, after notice the overseers of the poor refuse to provide for a pauper, an individual furnishing a necessary supply, may recover the amount in an action against the township."

In that case the underlying legal obligation of the township rested on a meager footing of express statutory provision, reinforced, however, by the inherent urgency of the cases provided for. We can not distinguish the view there taken from the one arising here, and we therefore hold that this action is maintainable. See also *Seagraves v. City of Alton*, 13 Ill., 366, and cases cited.

It is said, however, that the trial court erred in charging the jury that the words "able to pay" found in the statute are to be construed in the light of the exemption laws of this state. But an examination of the evidence on this subject discloses that the jury must inevitably have found each of the patients unable to pay the physician's fees, and we need not, therefore, determine whether the court's charge was too liberal on that point.

We find no error in the record and the judgment is affirmed.

ERRONEOUS CONVICTION OF FALSE SWEARING.

Circuit Court of Summit County.

GEORGIETTA BROWN V. STATE OF OHIO.*

Decided, April 20, 1907.

Perjury—Bastardy Case Begun by Married Woman—No Jurisdiction.

One can not be convicted of perjury for false swearing in a bastardy case before a justice of the peace, where the affidavit upon which the justice's jurisdiction depends shows that the complainant is a married woman.

HENRY, J.; WINCH, J., and GIFFEN, J., concur.

Plaintiff in error was convicted of perjury for having borne false witness in a bastardy proceeding before a justice of the peace. The affidavit on which the justice's jurisdiction was founded alleged that the complainant was "an unmarried woman in the sense that she has not lived with her husband for five years last past, nor have she and her husband Brown been together in a sense for five years past."

It is urged here, as it was below, that this allegation implies that the complainant was not an unmarried woman; that the justice therefore acquired no jurisdiction in the bastardy proceeding, and that plaintiff in error's false testimony as a witness in the proceeding was not perjury. And the prosecuting attorney very justly admits in his brief that "if the complaint on its face gave the justice no jurisdiction, then whatever the testimony might have been at the hearing, no perjury could have been committed."

Under Revised Statutes of Ohio, Section 5614, proceedings in bastardy can not be maintained an complaint of the mother, when the child in question was born and begotten during lawful wedlock (*Haworth v. Gill*, 30 O. S., 627). And regularly the affidavit should allege that the complainant is an unmarried woman (*Edwards v. Knight*, 8 Ohio, 375). A judgment against

*Affirmed without opinion, *State v. Brown*, 77 Ohio State, 636.

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the defendant in such a proceeding has, however, been sustained by the Supreme Court of Ohio, where this allegation was omitted (*Harrell v. State, ex rel*, 23 Bull., 149). And various other irregularities in bastardy cases have been held not to be fatal, upon the ground that such proceedings being civil rather than criminal, and their object beneficial and not punitive, the statute and proceedings thereunder should be construed indulgently. *Roth v. Jacobs*, 21 O. S., 646; *Hoff v. Fisher*, 26 O. S., 7; *Miller v. Anderson*, 43 O. S., 473; *Miller v. Busick*, 56 O. S., 437; *Wine v. Law*, 62 O. S., 649, affirming without report *Law v. Albert*, 16 C. C., 159.

This, however, is the rule only where jurisdiction has once attached either originally or by relation. Justices of the peace have but limited jurisdiction, which is not presumed but must affirmatively appear, and can arise only on compliance with the conditions by law prescribed. And a warrant issued and proceedings had, in any case before a justice, upon an affidavit which, if all true, alleges no offense, are without jurisdiction, unless, indeed, the defect is capable of being supplied by amendment, in such manner as to relate back and cure such want of jurisdiction (*Truesdell v. Combs*, 33 O. S., 186). There is no claim in this case that the facts disclosed in the trial of the bastardy proceeding would warrant any curative amendment of the affidavit, unless upon inspection of the affidavit alone the words used therein to qualify the allegation that the complainant was an unmarried woman, may be rejected as surplusage and as not necessarily irreconcilable with the allegation itself. It is urged that complainant's husband may well have been dead, or divorced, or long since disappeared and unheard from, or that their marriage was void, or putative merely. These suggestions are ingenious, but not convincing. The affidavit clearly implies that the complainant was not unmarried, in any proper sense of that term, but that, on the contrary, she had a husband, with whom, however, she had not lived for five years. A fact is thus affirmatively disclosed, in the very instrument on which alone the justice's jurisdiction could be founded, which prevented such jurisdiction from attaching. It follows, therefore, that all the subsequent proceedings in that case were void.

There was no warrant of authority in law forswearing any witness or taking any testimony. The plaintiff in error's oath and false testimony thereunder were without any lawful sanction or significance whatever, and perjury can not be assigned thereon. *Hamm v. Wickline*, 26 O. S., 85.

Upon the facts disclosed by the bill of exceptions the conviction was unwarranted by the evidence and is contrary to law. The judgment below is reversed and the cause remanded.

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**ORDINANCE FOR REGULATION OF SALE OF INTOXICATING
LIQUOR HELD DEFECTIVE.**

Circuit Court of Summit County.

CITY OF AKRON V. WILLIAM G. SEITZ,

Decided, April 17, 1908.

Municipal Corporation—Invalid Liquor Ordinance.

Under Section 1536-100, Revised Statutes, Subdivision 5, a municipal corporation has no authority to enact an ordinance to regulate the sale of intoxicating liquors, which does not contain the "regular druggist" exception found in Section 4364-20c, Revised Statutes.

HENRY, J.; WINCH, J., and MARVIN, J., concur.

The defendant in error was convicted before the mayor of Akron of allowing to remain open on Sunday a place where intoxicating liquors were sold on other days of the week, the same being in violation of an ordinance of said city. The common pleas court afterwards modified the sentence imposed by the mayor by eliminating the imprisonment feature to conform with the limitation of punishment for first offenses as provided in the statute defining and penalizing the like offense in the state at large.

From this judgment the city has filed a petition in error and the defendant in error a cross-petition. The latter's claims are (1) that there is no evidence that liquors were sold in the place in question on other days of the week; (2) that the in-

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formation does not allege any ownership, occupancy or control by defendant of the place by him allowed to remain open, and (3) that the ordinance is invalid because it does not fully set forth the "regular druggist" exception of Section 4364-20c, Revised Statutes, without which exceptions, no municipal ordinance on the subject can be lawfully enacted because of the express limitation upon the power conferred by the General Assembly on municipal corporations to enact such ordinances as laid down in Section 1536-100, Revised Statutes, subdivision 5, and in Section 4364-20.

Considering the last point first, we hold it to be well taken, on the authority of *Canton v. Nist*, 9 Ohio St., 439, in which it was held that a general Sunday observance ordinance was invalid because it failed to make the exception of works of charity, necessity, etc., as required by statute. The Legislature might have granted to municipal corporations the power to pass ordinances on this subject without any such exception of regular druggists as is contained in the state statute penalizing the Sunday opening of places where intoxicating liquors are sold on other days of the week. And it might have done this even though it still retained such exception in the state law. No inconsistency between an ordinance omitting such exception and the statute retaining it would in that case arise. This distinction is clearly pointed out in *City of Piqua v. Zimmerlin*, 35 O. S., 507, 509. The trouble here is that the ordinance overlaps the grant of power to municipalities to legislate on this subject. Such municipal legislation must contain the full "regular druggist" exception in order not to exceed the authority conferred by the General Assembly to enact the same.

It must not be inferred from this opinion that Sunday closing is not required of saloons in Akron for want of a valid ordinance to that effect. The state law on the subject is in full force and applies to Akron as much as to any other part of the state.

Our conclusion on this point renders discussion of the other questions unnecessary, but we remark in passing, that the information should have alleged defendant's ownership or control of the premises which he has been charged with having allowed to remain open on Sunday. It does not help the matter

that the information followed the phraseology of the ordinance in this behalf. Whether this would amount to a fatal defect in the ordinance were it otherwise valid need not now be considered; but it is surely true that no one can be lawfully convicted of allowing a place to remain open unless it be averred and proved that he was in some way in control of it.

In this case, also, the only proof that intoxicating liquors were sold in the place in question on other days of the week, is found in the characterization of the premises as a saloon; but as the word has been judicially defined in Iowa, where a man was convicted of keeping open a saloon after 11 o'clock at night, though only soft drinks, so-called, were sold there, the evidence here is not sufficient to prove that defendant's saloon was a place where intoxicating liquors were sold (*City of Clinton v. Grusendorf*, 45 N. W., 407). Many other cases to the same effect might also be cited.

The judgments of both courts below are reversed for the errors thus indicated; and because of the invalidity of the ordinance under which the defendant stands accused, he is discharged.

EXCLUSION FROM SKATING RINK ON THE GROUND OF COLOR.

Circuit Court of Summit County.

THOMAS LYONS, AN INFANT, BY HIS GUARDIAN, HANNIBAL LYONS, v. THE AKRON SKATING RINK COMPANY.

Decided, April 17, 1908.

Civil Rights Act—Authority of Doorkeeper and Ticket Taker at Skating Rink.

In an action for damages under the civil rights act, for refusal of admission to a roller-skating rink, where there is nothing in the record to show that the doorkeeper of the defendant corporation was entrusted by it with any authority or duty whatever beyond the taking of tickets and the admission of persons with tickets to the floor, explanations of the conduct of any other employee of the defendant, or any other feature of its business, is not within the sphere of the doorkeeper's agency.

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HENRY, J.; WINCH, J., and MARVIN, J., concur.

The parties to this proceeding in error stand related as they stood below. The original action was for damages under the Civil Rights Act, Section 4426, Revised Statutes of Ohio, for alleged exclusion of the plaintiff in error from the defendant in error's rink, on the ground of his race and color. The jury returned a verdict for the defendant.

The first error assigned is upon the exclusion of evidence. The plaintiff's father and guardian, Hannibal Lyons, testified that he and his son approached the ticket window at the rink and tendered twenty-five cents, the regular price for a skating admission ticket, which the father requested for his son. The ticket seller pushed back the money, shook his head, pointed towards the doorkeeper and the regulations posted at the entrance to the skating floor, and closed the window without saying anything. Thereupon the witness and his son approached the doorkeeper and the father asked, "Why is it that I can't buy a skating admission ticket for my boy?" To the next question put to the witness by plaintiff's counsel "What did he say?" objection was sustained, and he excepted, offering to prove that the doorkeeper replied "We don't allow colored people to skate in here."

It does not appear that either the plaintiff or his father for him made any application directly to the doorkeeper for admission to the skating floor. Their only application to him was for information as to why they were denied a ticket. There is nothing in the record to show that the doorkeeper was entrusted by the defendant with any authority or duty whatever beyond the taking of tickets and the admission of persons with tickets to the floor. Explanation of the conduct of any other employee of the defendant or any other feature of its business was not within the sphere of this doorkeeper's agency as thus defined. *The Ohio Oil Co. v. McCrory*, 14 C. C., 304, 306-7; *Baltimore, etc., Relief Assn. v. Post*, 15 Atl. Rep., 885.

We find no error in the exclusion of this evidence.

The second error assigned is the refusal to permit plaintiff's counsel, in cross-examination of the ticket seller, to inquire whether he had testified in the justice court, where the cause originated, to an incident apparently elicited from him for the first time in the court of common pleas.

These inquires were:

“Did you say a word there about Mr. Gault having ordered you not to sell any more skates or skating tickets or having said anything to you?” Also, “Did you testify in the justices’ court as to any orders that you had. not to sell tickets that evening?”

While these questions were proper enough for the purpose of testing the witness’ recollection, his cross-examination had already been conducted at some length, and we are not prepared to say that the trial judge abused his discretion in thus limiting it.

The third error assigned is upon the charge of the court, but no particulars having been pointed out to us, by the plaintiff in error, either in argument or brief, we forbear discussing the charge further than to say that, as we read it, it appears to be as favorable to the plaintiff in error as the law would allow.

The judgment is affirmed.

DIVISION OF ESTATE POSTPONED UNTIL DEATH OF WIDOW.

Circuit Court of Summit County.

THE PEOPLES SAVINGS BANK CO. V. OMAR N. GARDNER ET AL.

Decided, April 17, 1908.

*Testamentary Trust—Trustee Instead of Administrator to Administer—
No Division of Estate Until Time Mentioned in Will.*

1. Under a will creating a trust for the testator’s widow’s life in property devised to a son and daughter, and directing “the same to be parted and divided between them share and share alike as they may agree; said division not to be made until after the decease of my said wife Matilda but the property to remain intact until that event, and until then the rents of the real property shall go into my estate for the purpose of paying the eight hundred dollars per year to my said wife,” etc., “and in case either my son or daughter should die before a division of my estate, leaving no heir or heirs, that in that case the whole of said property shall go to the survivor of them,” unless all the beneficiaries of the trust consent, it is beyond the power of the parties

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or of the court to enforce a division of the estate until after the widow's death.

2. A trustee, *eo nomine*, should be appointed to administer the trust created under such a will, but an administration *de bonis non* will include the administration of the testamentary trust, until a trustee for the purpose is appointed.

HENRY, J.; WINCH, J., and MARVIN, J., concur.

This is a creditors' bill to subject Omar N. Gardner's interest in his father's estate under the latter's will, which devised the homestead and contents to his wife, and the remaining property to his son and daughter to life annuities of \$800 to his wife and \$500 to a former divorced wife.

The testator died in 1873, leaving his widow, who still survives; his son Omar, who, having become involved has recently disappeared, his daughter who afterwards died, leaving a family, and his divorced wife, who is also now deceased. The estate disposed of by the will consisted, besides the property specifically given to the widow, of several parcels of real estate in the city of Akron, in some of which, however, the executor, David Hanscom, had a half interest that was subsequently served in a partition suit brought for the purpose. The decree in that proceeding set off one of said parcels to the testator's two children jointly, subject to the annuity lien provided by the will.

Hanscom had conducted the administration until the son's majority, as provided by the will; thereupon he resigned, and, the estate being then still unsettled, the son was appointed administrator *de bonis non* with the will annexed. He rendered his final account in 1877, but continued to manage the property for the family, paying his mother's annuity, for thirty years thereafter. In 1907, he was removed as administrator and William Irvin appointed in his stead.

The court below appointed a receiver in this action at the instance of Omar N. Gardner's creditors, plaintiffs and cross-petitioners herein; but his father's administrator and widow contend that under the will the property must be kept intact and managed under the oversight of the probate court as long as she lives.

As we construe the will, it creates a trust for the widow's life in the property devised to the children, directing "the same to be parted and divided between them share and share alike as they may agree; said division not to be made until after the decease of my said wife, Matilda, but the property to remain intact until that event, and until then the rents of the real property shall go into my estate for the purpose of paying the eight hundred dollars per year to my said wife, * * * and in case either my son or daughter should die before a division of my estate, leaving no heir or heirs, that in that case the whole of said property shall go to the survivor of them."

Unless all the beneficiaries of this trust consent, it is thus put beyond the power of the parties or of a court of equity to enforce a division of the estate until after the widow's death. If the ordinary administration is complete, as the evidence shows it is, it becomes the duty of the probate court, upon application under Section 5986, Revised Statutes, to appoint a trustee to execute the trust so created by the will, for want of an appointment in the will itself. A trusteeship *co nomine* and not administration *de bonis non*, is what the statute contemplates under these circumstances. But the appointment actually made by the probate court of an administrator *de bonis non* will also include the administration of the testamentary trust as specially created by the will, unless upon application there made the more appropriate appointment of a trustee for that purpose be substituted therefor (*Matthews. Admr., v. Meek*, 23 O. S., 272, 289). Such trustee has under the statute exclusive control of the property subject to the supervision of the court appointing him. The most we can do here is to enter a decree that the interest of Omar N. Gardner in said trust be subjected to the payment of his debts. His mere equity might be sold, if it would benefit the creditors here to do so; but as such sale would not divest the trustee of his possession and control of the property, we can see no advantage to them from such a course, especially as that equity may never mature into a legal estate; for if Omar N. Gardner should die without issue before his mother's death, it is at least doubtful whether his interest in the property would not then pass to his sister's heirs, if any. We might also, if

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however, the creditors desire, continue the receivership, limiting the receiver's authority to the collection by him from the trustee, of Omar N. Gardner's share of the rents and profits of his father's estate as they accrue from year to year. This, we take it, would also be a most wasteful proceeding. The simplest solution as it seems to us, is so to mould our decree as to ascertain and declare the interests of the plaintiffs in Omar's present equity and contingent remainder in his father's real estate so that they may be duly recognized by the trustee as long as the trust continues, and be properly taken care of in the partition of the estate when the widow dies.

What has thus far been said applies to all the property except the first parcel described in the petition. We have given careful consideration to the contention that as regards all of the real estate the parties are bound to a contrary interpretation of the will by the actual setting off to the children of a legal estate in this one parcel which was the subject of the Hanscom partition proceedings; but we do not subscribe to that view. They were bound by that proceeding with respect only to the land then in controversy, and may well decline to acquiesce in further division of the estate. The court's decision must be construed to have proceeded not upon the construction of the will, but upon the tacit consent to the decree then entered, so far only as it concerned the subject-matter of that action. Such consent was given by all the *cestuis que trustent* under the elder Gardner's will, for they were all parties to that action, and the decree is conclusive and binding upon everybody so far as that one parcel is concerned.

Omar N. Gardner's thirty years' management of the remaining property is not conclusive of his mother's rights here; for its import, so far as the widow is concerned, is at most equivocal. She received her annuity from the one who had been duly appointed administrator with the will annexed; and her conduct in that behalf so far from indicating that she looked to him personally instead of officially, apparently indicates the contrary.

The creditors may take a decree ascertaining their interests and their succession, so far forth, to the rights of Omar N. Gardner in his father's estate. The decree may also provide

for a sale of Omar N. Gardner's interest in the parcel of land aperted to him and his sister jointly in the Hanscom partition proceeding, subject, of course, to the lien of the widow's annuity. The costs are adjudged against Omar N. Gardner.

OBSTRUCTION OF VACATED STREET.

Circuit Court of Summit County.

THOMAS WORTHINGTON, ON HIS OWN BEHALF AND ON BEHALF OF
THE CITY OF AKRON AND OTHER TAX-PAYERS, V. THE
CITY OF AKRON AND THE STANDARD
TABLE OIL CLOTH CO.

Decided, April 17, 1908.

*Municipal Corporation—Nuisance in Street—Action Therefor—Plaintiff
Can Not Maintain Action, Unless.*

A plaintiff can not maintain an action against a municipality and others for obstructing a street, either in his individual capacity or as an abutter upon the street, unless the nuisance sought to be abated is private and personal to him, affecting him or his property in a manner differing not merely in degree, but in kind from its effect upon the community in general, and he can not maintain such action as a tax-payer, for want of statutory provision therefor.

HENRY, J.; WINCH, J., and MARVIN, J., concur.

The plaintiff in this appeal seeks to enjoin the obstruction of Moore avenue or street in the city of Akron by the defendant oil cloth company, acting under color of an ordinance passed by the council of said city for the vacation of that portion of said street on which said oil cloth company's property abuts. The claim that the obstruction of this part of the street in question is unlawful rests chiefly upon alleged want of jurisdiction in the council over this particular street, because it was and is a county road, and upon the council's reconsideration in alleged due season of the vote, whereby said ordinance was passed, followed by indefinite postponement of further consideration thereof.

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The character in which the plaintiff sues is, as disclosed by the caption, three-fold, viz., (1) personally, (2) as a tax-payer under favor of Section 1536-668, Revised Statutes, and (3) as owner of property abutting on said street though not on the vacated portion thereof.

In the first and last of these capacities it is clear that he has no right to sue, unless the nuisance sought to be abated is private and personal to him, affecting him or his property in a manner differing not merely in degree but in kind from its effect upon the community in general.

No such case is here made. The plaintiff has left to him other, although it may be more circuitous, inconvenient or difficult, means of access from his own premises to every point within and without said city which was accessible to him before Moore street was obstructed. If the obstruction complained of is unlawful, it is thus, so far as plaintiff is concerned, a purely public nuisance, which it is the city's duty to abate, but which can not become the subject of an action founded upon any private right to sue unless the statute has expressly given such right.

The only claim of statutory right here arises under Sections 1536-667 and 668, Revised Statutes, but a careful perusal of those sections discloses no right thereby conferred on the city solicitor of his own motion or on request of a tax-payer to bring an action to enjoin a street obstruction; from which it follows that a tax-payer, on his refusal, can bring no such action in his stead. Whatever remedy may be afforded by said sections the one here sought to be invoked is certainly not included therein.

Holding as we do that plaintiff has misconceived his remedy and that he can not in any of the three capacities named by him maintain this action for injunction, the petition is dismissed.

**RECOVERY FOR PROPERTY SET ON FIRE BY A PASSING
LOCOMOTIVE.**

Court of Appeals for Wood County.

**THE HOCKING VALLEY RAILWAY COMPANY v. WILLIAM B. JAMES.
TRUSTEE OF RADELOFF BROTHERS, BANKRUPT, AND
THE CONNECTICUT FIRE INSURANCE
COMPANY OF HARTFORD.**

Decided, May 8, 1913.

*Railways—Store Building Destroyed by Fire—Supposed to Have Been
Started by a Passing Locomotive—Bills of Exceptions—Charge of
Court—Admissibility of Evidence as to Other Fires Along Right-
of-Way.*

1. Where a bill of exceptions merely shows that a request for special instructions was made in writing before argument, there is a failure to show compliance with the statutory requirement that the instructions asked for should be in writing and that the request to give them before argument be made.
2. An averment in the petition that the locomotive which it is claimed set the plaintiff's property on fire was being operated in a southerly direction, is immaterial and need not be proven; nor is it necessary the jury should find the engine was being operated on defendant's road, when there is no contention that the company owning the road was operating that particular engine.
3. In an action for recovery for property destroyed by fire started by a passing locomotive, testimony is competent as to other fires occurring along the railway right-of-way immediately before or after the one complained of.

Wilson & Rector, F. C. Amos and F. P. Riegle, for plaintiff in error.

Ladd & James and Benj. F. James, contra.

RICHARDS, J.; KINKADE, J., and CHITTENDEN, J., concur.

The action in the court of common pleas was brought by William B. James, as trustee in bankruptcy, and the Connecticut Fire Insurance Company against the Cleveland, Cincinnati, Chicago & St. Louis Railroad Company and the Hocking Valley Railway Company, to recover for the loss of a certain store

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building and contents located at Lemoyne in this county and claimed to have been destroyed by fire in March, 1911, by the negligence of the defendants. The property destroyed was the property of Radeloff Brothers and was insured against loss by fire in the Connecticut Fire Insurance Company. The loss for which the insurance company was liable was adjusted between the company and the assured and the amount as between those parties was agreed to be the sum of \$1,546.12, which amount was paid by the insurance company. Thereupon this action was brought by the trustee of Radeloff Brothers, the assured, and the Connecticut Fire Insurance Company to recover of the two railroads named the total loss claimed, viz, \$2,073.64.

It is averred in the petition that the Hocking Valley Railway Company was the owner of the right-of-way and that the other railroad company, known as "the Big Four," was operating a train on the occasion in question and from it the fire is averred to have originated. The property destroyed was situate about a hundred feet from the track of the railway company. On the trial in the common pleas court a verdict was rendered in favor of the plaintiffs and against the Hocking Valley Railway Company for \$2,222.67, the jury finding that the Cleveland, Cincinnati, Chicago & St. Louis Railroad Company was not liable, and judgment has been rendered upon this verdict.

The case is brought here on a petition in error and a bill of exceptions which is certified in the usual form to contain all the evidence. One of the principal grounds of error upon which reliance is made is that the verdict is not sustained by sufficient evidence, and issue was joined between the parties as to the existence and terms of the insurance policy which was claimed to cover the property destroyed by fire, the petition averring separate amounts of insurance upon different classes of property covered by the policy and destroyed by fire. The insurance policy was therefore an important item of evidence, and was introduced in evidence by the plaintiffs and received by the court and marked Exhibit "B," but is nowhere attached to the bill of exceptions. Because of this omission we are not authorized to consider the case upon the weight of the evidence. It

has been many times held that the failure to attach exhibits precludes the reviewing court from passing upon the weight of the evidence. A few cases illustrating the principle may be cited: *Foster Coal Co. v. Mohrman*, 9 C. C., 544, failure to attach map; *Hohly v. Sheely*, 21 C. C., 484, failure to attach photographs; *Mich. Cen. R. R. Co. v. Waterworth*, 21 C. C., 485, failure to attach photograph; *State of Ohio v. Hinkleman*, 32 C. C., 1, failure to attach bottle. This latter case was affirmed without report, 83 O. S., 446.

It is further contended that the trial court erred in refusing to give to the jury in the charge certain instructions before argument. The bill of exceptions recites the following: "Before argument, counsel for defendant in writing requested the court to specifically charge the jury as follows:" The statute, General Code, 11447, provides that either party may present written instructions to the court on matters of law and request them to be given to the jury.

It does not appear from the language of the bill of exceptions that the instructions asked were in writing as required by this statute, nor that they were requested to be given before the argument, but simply that the request was made in writing and before argument. Under the statute the request need not be in writing but the instructions which are requested to be given must be in writing.

The first request so asked to be given was properly refused by the court. It involves a statement that the jury must find for the defendants if the evidence fails to "satisfy" them. Of course it is fundamental that an ordinary civil action may be determined by a preponderance of the evidence, and the language of the instruction asked is condemned in *C., H. & D. Ry. Co. v. Frey*, 80 Ohio St., 289.

The next instruction asked contains in substance a statement that the jury can not find for the plaintiffs unless they should find that the engine was being operated on defendant's road in a southerly direction. We find no error in the refusal of the court to give this instruction. It is true the petition avers that the engine was being operated in a southerly direction, but the mere direction in which the engine was proceeding was imma-

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terial and need not have been averred, and having been averred need not have been proven. The instruction is open to the further objection that it requires a finding from the jury that the engine was being operated on defendant's road, while it was not contended that the railroad belonged to the Cleveland, Cincinnati, Chicago & St. Louis Railroad Company, which company was sought to be held only because it was claimed to have been operating the engine.

We deem it unnecessary to discuss in detail the two remaining instructions asked to be given by counsel for plaintiff in error. It is sufficient to say that we find no error in the action of the court in refusing to give them. It is contended by counsel that the court erred in its general charge to the jury, but the bill of exceptions fails to disclose that counsel lodged any exception to the action of the court in giving the general charge.

Numerous exceptions appear in the record to the admission and exclusion of evidence. Several of those exceptions relate to the admission of testimony offered by plaintiff as to a fire along the right-of-way shortly before or shortly after the fire which destroyed the property of Radeloff Brothers. The court admitted evidence of that character, but it seems to have been limited very closely to the occasion of the fire in controversy, and such evidence has been frequently held to be competent. The circuit court sitting in Ottawa county held in *The Lakeside & Marblehead Co. v. Kelly*, 10 C. C., 322, that other fires about the time and immediately after the passage of the locomotive might be shown. In the case of *L. S. & M. S. Ry. Co. v. Anderson*, 27 C. C., 577, it is held that fires originating soon after locomotives of the company had passed along the road might be shown. We think that the trial court committed no error in the admission of this class of evidence, limited as it appears to have been.

It is insisted that prejudicial error was committed in the admission of Exhibit "A," being four yellow sheets containing items of merchandise and their value as made out and attached to the proof of loss made to the insurance company after the fire. Andrew Radeloff, one of the assured, had testified that he and his brother spent the entire day with the adjuster in

making these items and affixing the figures thereto. The items are very numerous, being contained as stated, on four pages. The witness testified that these items were correct. The trial judge gave ample opportunity to counsel for the defendants to cross-examine relative to this list, and admitted it in evidence to save time in the trial of the cause. Counsel for defendants requested of the trial court an opportunity to examine Exhibit "A" so that they might cross-examine if they saw fit and their request was granted by the court, as appears in the earlier portion of the bill of exceptions. The matter again came up immediately before plaintiffs rested their case, and counsel declined to avail themselves of the privilege so accorded, and it was only after this situation had arisen that the court permitted the admission in evidence of the exhibit. It is impossible to examine this bill of exceptions without reaching the conclusion that the witness Andrew Radeloff in effect testified that the contents of Exhibit "A" are correctly stated and were furnished by him, and we think under all the circumstances of the case that no error was committed to the prejudice of the defendants by the admission of Exhibit "A" in evidence.

Notwithstanding the fact that the bill of exceptions fails to contain the insurance policy known as Exhibit "B," we have made a careful examination of the evidence and believe that on the whole case substantial justice was done to the parties, and finding no prejudicial error, the judgment of the common pleas court will be affirmed.

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EMPLOYEE CRIPPLED BY ELECTRIC SHOCK.

Circuit Court of Lorain County.

**THE CLEVELAND & SOUTHWESTERN TRACTION COMPANY v. LISLE
E. GARNETT.***

Decided, April 29, 1908.

*Negligence—Charge of Court—Request for Special Verdict in Writing—
Submission of Interrogatories to Jury.*

1. When what is intended to be a request that the court "direct the jury to give a special verdict in writing upon certain issues" amounts to nothing more than "a request to instruct the jury to find specifically upon particular questions of fact," and is not couched in such terms as to require being given as the latter, there is no error in refusing to give it at all.
2. When the court in his charge to the jury in an employer's liability case defines negligence as the want of ordinary care, it is not improper to submit to the jury interrogatories to be answered by it which require it to state whether or not the plaintiff, as well as the defendant, were negligent.

HENRY, J.; WINCH, J., and MARVIN, J., concur.

This proceeding in error is prosecuted by the Cleveland & Southwestern Traction Company to reverse a judgment recovered against it by Lisle E. Garnett, for injuries sustained by him while in its employ and in consequence of an electric shock and burns by which he was crippled about the hands. Garnett was employed in the traction company's Rockport shop and yard as a pitman, and had been in the service the better part of a year. His duties required him to work underneath cars, which needed repairing, in a pit provided for that purpose. He was accustomed also to perform other tasks about the yard, so that his knowledge of the use of electric currents and the presence of overhead electric wires about the yards may be presumed.

At the time Garnett was injured, he, with other employees of the company, were engaged in shifting cars in the yards, and

*Affirmed without opinion, *Cleveland & Southwestern Traction Co. v. Garnett*, 81 Ohio State, 483.

in pursuance of general directions in their behalf he was helping to place certain of these cars on a spur-track and was riding at the forward end of a flat-car. At the end of this spur-track was a railroad box car which had been fitted up with a transformer in order to change an alternating current of electricity into a direct, or *vice versa*. This car was known as a sub-station, and into the end of it, towards which Garnett and the cars upon which he was riding were approaching, some wires each of the diameter of a lead pencil were let in from a pole nearby in order to connect with said transformer. These wires entered the box car through the end and directly underneath its roof. They were insulated at the point of entrance and for a foot or so outside the car, but beyond that they were bare. After leaving the car they extended horizontally for a short distance, before the curve of the sag carried them up to the top of the pole to which they were attached.

Garnett stood on the car with one hand on the brake, and with the other hand he gave a signal to stop, in order that the cars might not collide with this box car sub-station. While in this attitude, his upraised hand came in contact with one of the wires, and, a circuit having been established through his body and the brake, he sustained the injuries already mentioned.

The men who were shifting these cars had not been specifically directed to put any of the cars on this particular spur-track, neither had Garnett been specifically directed to ride on any car. He and the others chose their own way and manner of performing the work. He had not been specially warned about the particular hazard which resulted in his injuries, and he testifies that he did not know that the box car was a sub-station or that there were any wires entering it, or that any current of electricity was conducted to it. He knew, however, what a sub-station was, from his experience in the shop where another transformer was in use. The wires, moreover, which entered this sub-station were plainly before his eyes, had he been looking in that direction, and had he known of their presence he would probably have had reason to believe from his general experience, that they were charged with a dangerous electric current.

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The surgeon who treated his injuries conversed with him about the accident soon after it occurred, and both he and a by-stander at the hospital declare that Garnett then admitted that he had known that the wires were there and their character, and that when he raised his hand to signal he forgot about them. Garnett positively denies that he made any such statement and the jury evidently believed him. We are not prepared to say on all the evidence, that he either had or was chargeable with such knowledge. It is entirely conceivable that his notice had never been attracted to the wires entering the box car and to the danger of performing these common duties of a brakeman in the usual manner in which he did perform them on this occasion. Under all the testimony we might perhaps differ from the conclusion to which the jury came in this behalf, but we are not able to say that their verdict is clearly wrong, either with respect to the alleged contributory negligence and assumption of risk by the plaintiff below or on that of the negligence charged against the defendant below. We can not, therefore, disturb the judgment upon the ground that the evidence is insufficient to uphold the finding for the plaintiff in these respects.

Other errors assigned relate to the somewhat unusual matter of practice invoked by the defendant below in requesting the court to require the jury to find a special verdict under Sections 5200 and 5201, Revised Statutes, which provide that "the verdict of a jury must be either general or special" and "in all actions the jury, unless otherwise directed by the court, may, in its discretion, render either a general or special verdict; but the court shall, at the request of either party, direct them to give a special verdict in writing upon all or any of the issues."

A special verdict is understood to be one by which the jury returns findings upon the several issues of fact separately, leaving the court thereafter to render such judgment as the facts so found may require. When such a verdict is required the party requesting the same usually presents such form of finding as he thinks the evidence warrants, and the court submits the same to the jury with such emendations as upon the suggestion of opposite counsel or otherwise, may seem to be required. The jury may vary the outline of the special verdict thus submitted

to them in such manner as they may think the evidence makes necessary. Sometimes competing forms of verdicts are submitted representing the contentions of the opposite sides, respectively, as to what the evidence should be deemed to prove. If such forms are drawn up in a narrative style it is manifest that however useful they may be where the issue is single, they are quite unfitted to express the actual agreement of minds at which the jury will arrive respecting a great variety and complexity of issues and cross-issues, such as an employer's liability damage case usually presents. General speaking a jury is but poorly qualified to draw up a form of special verdict of its own or to materially vary a form prepared in advance for its use. In this case the narrative form of special verdict was not presented by the defendant when its request was made. Instead, a series of questions deemed by it to cover the issues in the case was offered, together with certain special requests to charge before argument, which were also proffered in writing. These requests to charge referred by number to various questions in the so-called special verdict submitted by the defendant, in such manner that if the form of verdict was disallowed, the requests to charge would have to be disallowed also. Both were in fact rejected by the court, and properly so, we think, under the authority of *Gale v. Priddy*, 66 O. S., 400, the *per curiam* in which at pages 403 and 404, is in part as follows:

“It does not appear that the court requested to instruct the jury ‘to find specially upon particular questions of fact,’ although questions seem to have been prepared and submitted to the court for the purpose of procuring such a special finding. Instead of such a request, the record shows that the defendant requested the court ‘to direct the jury to give a special verdict in writing upon certain issues,’ which is a very different thing. It does not appear that a special verdict on any ‘issues’ was prepared and submitted as is the general and proper practice in such cases (22 Ency. Pl. & Pr., 993); but it does appear that certain ‘particular questions of fact’ were prepared, which counsel doubtless desired to have answered by the jury. A ‘particular question of fact’ (Section 5201, Revised Statutes) is something different from, and less than an ‘issue’ and the object of the statute is that these special findings, if inconsistent with the general verdict, may control it.”

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It thus appears that what was intended to be a request that the court "direct the jury to give a special verdict in writing upon certain issues," amounted in this case to nothing more than "a request to instruct the jury to find specifically upon particular questions of fact," and it was not couched in such terms as that in either aspect the court was bound to grant it. The first two paragraphs of the syllabus in the same case are as follows:

"1. A request that the court will direct the jury to render a special verdict in writing, upon any or all of the issues in the case, is not a request to instruct the jury that if they find a general verdict, they shall find specially upon particular questions of fact, as provided in Revised Statutes, Section 5201.

"2. Section 5201, Revised Statutes, so far as it relates to special findings upon particular questions of fact, is mandatory only when the request therefor contains the condition that the questions which are submitted shall be answered in case a general verdict shall be rendered."

Notwithstanding the futility of defendant's request for a special verdict, the court did in fact instruct the jury to make their verdict special instead of general, thus heeding the request, so far forth, but substituting in place of the entire list of questions tendered by defendant below, a list prepared by the court, supplemented by certain of defendant's questions, the same being submitted to the jury with their authorship thus distinguished. The alleged error in thus disclosing the origin of the questions in connection with the court's draft of special verdict is, in our opinion, without foundation. Some of the defendant's questions so submitted, were answered by the jury in a manner as favorable to the defendant as it could ask, and in any event we can see no prejudice to it in this procedure. If the court could not of its own motion require the jury to return a special verdict under the statutory provision in that behalf, the color of the defendant's request therefor, informal and invalid though that request was, would suffice to sustain the court's action in this respect, and the same is true with respect to the court's drafting in the form of interrogatories instead of in narrative form, this special verdict which it instructed the jury

to return. The impracticability of formulating a special verdict in narrative form in this case, in view of the complexity of the issues; the practice which the defendant had already sought to establish by drafting its request for a special verdict in the same manner; and its failure to withdraw its request for a special verdict; in the turn which the case finally took before submission to the jury, render it impossible for us to hold that the court committed an error in the matters of practice which we have just discussed.

It is said, however, that the questions submitted to the jury with the answers thereto, can not collectively be considered as a special verdict on the facts alone, so as to dispense with the general verdict, for two reasons.

1. Because it does not exhaust all the issues in the case.
2. Because it includes findings other than those of mere fact.

On the first point it is true that many of the probative facts sought to be elicited from the jury in the form of the so-called special verdict, submitted by the defendant below, were of such a nature, within the rule of *Gale v. Priddy, supra*, as that ultimate material facts might have been inferred therefrom, and if the interrogatories of this character had been submitted with a proper request to the court to instruct the jury to find specially upon the particular question of fact to which they related, it would undoubtedly have been the duty of the court to submit them to the jury accordingly. Considered, however, as component parts of a special verdict, they were not essential questions, if all the issues of fact in the case were otherwise fully covered in the form of verdict actually submitted; and this after careful examination we find to be the case. It would perhaps be unprofitable to enter into a minute examination here of all of the issues of fact presented by the pleadings and in the special verdict found by the jury. Suffice it to say that point by point we have set the pleadings over against the verdict and find that the latter completely covers all issues made by the foreman.

On the second point (if the jury in returning a special verdict is confined by the statute to the facts), the question of negligence is, as frequently said by our Supreme Court, a mixed

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question of law and fact; and the form of special verdict submitted by the court to the jury in this case required them to answer specifically whether the defendant was negligent, and also whether the plaintiff was negligent. In the charge negligence was defined as want of ordinary care, and ordinary care was defined in the familiar terms laid down by our Supreme Court. If the jury had been asked to say whether plaintiff and defendant respectively exercised such care, in respect to the matters charged to be negligent in the pleadings, as persons of ordinary prudence are accustomed to employ under similar circumstances, such questions, together with the jury's answers thereto, would, we think, have been within the realm of fact as distinguished from conclusions of law. With the term negligence defined as the court did define it to the jury, the circumlocution was avoided and the same result follows as if the more involved phraseology had been employed in the verdict itself.

We hold, therefore, that the errors assigned in regard to the special verdict were all unfounded.

It would extend this opinion to undue length to consider at large all the numerous exceptions reserved in respect to the production of evidence, the charge and requests to charge, etc. Suffice it to say that we have carefully examined every point urged in the arguments and briefs of counsel, without finding any reversible error in the record, and the judgment is therefore affirmed.

ACTION FOR DIVISION OF REAL ESTATE COMMISSIONS.

Circuit Court of Lorain County.

R. F. POWELL v. W. N. LITTLE.

Decided, April 29, 1908.

Contract—Real Estate Commissions.

In an action by a hotelkeeper against a real estate agent to recover on a contract whereby the latter agreed to pay to the former one-half of all commissions on sales made "to customers desirous of purchasing real estate who should be introduced by the plaintiff to the defendant," it is not error for the court to charge that should the jury find that a person to whom the agent subsequently sold real estate was not, at the time of introduction to defendant by plaintiff, desirous of purchasing real estate, then the plaintiff has failed to establish the performance of the contract on his side.

HENRY, J.; WINCH, J., and MARVIN, J., concur.

The parties to this proceeding in error stand related as they stood below, the jury there having returned a verdict for defendant. The plaintiff in error, Powell, being the landlord of a hotel in the city of Lorain, claims to have entered into an oral agreement with the defendant in error, Little, a real estate agent of the same place, whereby the latter was to pay to the former one-half of all commissions on sales made to customers desirous of purchasing real estate who should be introduced by Powell to Little. One Jane Miller was introduced by Powell to Little and the latter made a number of sales to her from which it is claimed that he received \$3,675 in commissions. On plaintiff's demand, the defendant paid him \$400, but refuses to pay him the balance of \$1,437.50 which he still claims.

The defenses interposed are, first, that no such agreement was entered into; secondly, that at the time of Jane Miller's introduction by Powell to Little, she was not in fact desirous of purchasing real estate; thirdly, that the \$400 was paid by way of settlement of plaintiff's entire claim which defendant disputed, and that after said settlement, Powell, treating his relations with Little as ended, sought to defeat further sales through him to

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said Jane Miller; and fourthly, a partial defense, namely, that defendant received only \$2,250 in all by way of commission on sales to Jane Miller.

The whole testimony of the defendant Little, who was called by plaintiff for cross-examination, with his checks and statements in writing made to Powell, and also the testimony of Gilbert Lackey and F. A. Wilder, seem to show that a contract substantially as claimed was entered into between the parties and if the verdict of the jury hinged only upon this issue we should be inclined to hold that it is unsupported by the evidence.

Upon the issue, however, of Jane Miller's desire or intention in regard to the purchase of real estate at the time of her introduction to the defendant, she and Little both deny that she entertained or manifested any such purpose until it transpired that her desire to lease a storage warehouse could not be realized. The change of plan occurred, however, very speedily in Little's negotiation with his new found customer, insomuch that having convinced her of the impracticability of leasing and the necessity of buying outright such property as she desired to use, if her object was to be attained at all, he actually sold her several parcels of land within the next twenty-four hours.

This is, of course, a very narrow distinction to draw, and if the jury had found the other way upon this issue, in view of all the evidence relating to it, we should have been, perhaps, more content with the accuracy of their deduction. The narrowness of the distinction is, moreover, emphasized by defendant's third request to charge, which was granted, and the latter half of which is as follows:

"If you find from the evidence in this case that the contract alleged in plaintiff's petition was entered into by the parties thereto, then I say to you that it will be necessary for you to further consider the evidence in this case and determine whether the said Jane Miller was introduced to the defendant by plaintiff as a person desirous of purchasing real estate in the city of Lorain, Ohio, and should find from the evidence which has been given to you that at the time of said introduction the said, Jane Miller was not desirous of purchasing real estate in the city of Lorain, then the plaintiff has failed to establish the performance of the contract on his side, if you find there was one, your verdict should be for the defendant."

This charge is complained of as misleading and as misstating the contract; and, indeed the words "introduced as a person desirous of purchasing real estate," when considered by themselves, might well be misleading, as laying stress upon a possible defect in the manner of introduction. But in the next phrase of the same sentence, the point on which the jury's finding on this issue is required to turn is, was or was not Jane Miller, at the time of the introduction, in fact desirous of purchasing real estate in the city of Lorain?" Narrow as the distinction undoubtedly is, the request to charge follows the language of the petition in this respect. This charge was requested in writing to be given before argument, and the court could only grant or refuse it. It could not be modified. If the phraseology was ambiguous, it was plaintiff who first used it, and not only so, but he retained it in his second amended petition after he knew from defendant's answer to his former petition that it would be made the basis of this very distinction. Should the court have refused this request to charge that if the jury were of opinion that plaintiff had not proved the fulfillment of the terms of his agreement as the same were recited in the plaintiff's petition, their verdict must be for the defendant? A majority of the court think not, and we find no error in the particulars thus discussed.

The exceptions reserved during the production of evidence we have examined one by one. Without rehearsing them here, we find that some exceptions to the exclusion of evidence are not supported by offers to prove. Others, particularly in the examination of the witness Coulter, are not sustainable, because of the hearsay rule. Suffice it to say that we find none of the assignments of error to be well founded and the judgment is affirmed.

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WIFE'S RIGHT TO DEVISE PROPERTY DEVISED TO HER.

Circuit Court of Lorain County.

HENRY McROBERTS ET AL V. HENRY H. BARNARD ET AL.*

Decided, April 29, 1908.

Will—Devise to Widow to Her Disposal During Life—She May Will.

A widow who has received real estate under her husband's will "to be to her and to her disposal during her life," may dispose of the same by her will.

HENRY, J.; WINCH, J., and MARVIN, J., concur.

The only feature of this case which we deem it necessary to discuss here is the true interpretation of the second item of Pitt McRobert's will, as follows:

"I give and devise all the residue of my estate to Abby my beloved wife, to be to her and to her disposal during her life."

The testator's widow, Abby, undertook to dispose, by will, of the real estate thus devised to her. The validity of this disposition by her obviously can be rested either upon the view that she was invested with the fee therein by the term of her husband's will, or upon the view that her husband's will invested her with the power to make testamentary disposition of the same. The first of these views seems to us to be supported by the case of *Davis et al v. Corwine et al, Exrs.*, 25 Ohio State, 669, and *Lepley et al v. Smith*, 13 C. C., 189.

The second view is supported by the Massachusetts case of *Burbank et al v. Sweeney*, 37 Southeastern, 669, a well considered case which we approve.

Judgment below affirmed.

*Affirmed without opinion, *McRoberts et al v. Barnard et al*, 81 Ohio State, 560.

LOCOMOTIVE ENGINEERS ON SAME ROAD ARE FELLOW-SERVANTS.

Circuit Court of Lorain County.

THE LAKE SHORE & MICHIGAN SOUTHERN RAILWAY COMPANY V.
RUDOLPH STARK, ADMINISTRATOR.*

Decided, April 29, 1908.

Wrongful Death—Negligence of Fellow-Servant—Locomotive Engineers are Fellow-Servants.

Two engineers, on different locomotives, are fellow-servants, and where one is killed solely on account of the negligence of the other, there can be no recovery against the railroad company.

HENRY, J.; WINCH, J., and MARVIN, J., concur.

The action below was for death by wrongful act. The defendant in error was plaintiff below. His intestate, Frank Stark, was an engineer in the employ of the plaintiff in error. On the day of the accident, he, with a fireman, had charge of engine No. 818, east bound, standing on a side-track at Graytown. Their train had been detained there for several hours. At the same time engineer Van Glahn, with a fireman, was in charge of engine 773, west bound, which with his train and crew had been detained on a side-track at Rocky Ridge for many hours.

About 5:45 o'clock A. M., the train dispatcher on being advised that Van Glahn's engine was out of water, issued an order to the conductor and engineer of its train, as follows: "C. and E. Engine 773. Engine 773 will run extra Rocky Ridge to Port Clinton, protecting itself against all trains." Port Clinton was east of Rocky Ridge and Graytown west thereof. About the time the order above quoted was given, Stark, who was killed, started with his train from Graytown towards Rocky Ridge and Port Clinton. As he approached Rocky Ridge, Van Glahn, with the fireman and brakeman, was just starting to cross over

*Affirmed without opinion, *Stark, Admr., v. L. S. & M. S. Railway Co.*, 81 Ohio State, 560.

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from the west bound to the east bound track, en route to Port Clinton for water, in pursuance of said order. Before Van Glahn's engine had fully passed from the cross-over to the east-bound track, Stark's engine overtook it, and in the ensuing collision Stark was killed.

It is practically admitted that one cause of this collision was Van Glahn's failure to observe the company's rules, 99, 100 and 102, quoted on pages 22 and 23 of the bill, as follows:

"Rule 99. When a train is stopped by an accident or obstruction, the rear brakeman must immediately go back with danger signals to stop any train moving in the same direction. At a point ten telegraph poles, or 1,500 feet, from the rear of his train, he must place *one* torpedo on the rail; he must then continue to go back at least twenty telegraph poles, or 3,000 feet, from the rear of his train, and place *two* torpedoes on the rail, ten yards apart (one rail length) when he may return to a point ten telegraph poles or 1,500 feet, from the rear of his train, and he must remain there until recalled by the whistle of his engine; but if a passenger train is due within *ten minutes*, he must remain until it arrives. When he comes in, he will remove the torpedo nearest to the train, but the two torpedoes must be left on the rail as a caution signal to any following train.

"Should the flagman be recalled before reaching the required distance, he will place two torpedoes on the rail, on the engine-man's side, ten yards apart (one rail length) and immediately return to his train, unless an approaching train is within sight or hearing.

"If from any cause the speed of the train is reduced, the conductor will be held responsible for fully protecting the rear of the train by use of proper signals.

"If the accident or obstruction occurs upon single track, and it becomes necessary to protect the front of the train, or if any other track is obstructed, the front brakeman must go forward and use the same precaution. If the front brakeman is unable to go, the fireman must be sent in his place.

"Rule 100. Freight trains having work to do on any other track may cross over if no passenger train is due, provided no approaching freight train is in sight; and also provided that the flagman has been sent out in both directions with danger signals, as provided in rule 99.

"Rule 102. When it is necessary for a train on double track to cross over to the opposite track, a flagman must be sent out in both directions with danger signals, as provided in rule 99."

Van Glahn failed to take the precautions required of him under the circumstances, by these rules. It is suggested that inasmuch as these rules had been disregarded on some occasions to the knowledge of persons having superintendence of the running of trains, they might be regarded as having been thus abrogated. But the second paragraph of the syllabus in the case of *The New York, Chicago & St. Louis Railroad Company v. Ropp*, 76 O. S., 449, shatters this contention. It reads:

“The failure to obey any such rule is not excused by the presence or consent of another servant of the master, who is superior to the servant who agreed to obey such rule, when the superior servant is not authorized to represent the master in the making or changing of rules or contracts; and failure to obey the rule under such circumstances is negligence *per se*.”

The claim of liability really relied on, however, is stated in defendant in error's brief as follows: “The negligence in this case was the despatching of Stark out of Graytown at 6:10 A. M. when he knew or ought to have known that Van Glahn had an order to come up on the east bound track, and in not notifying Stark, as he says he might have done, five minutes before the accident.”

The case was in fact submitted to the jury and they found their verdict for the plaintiff below, upon the sole issue as to whether, under the circumstances of this case, the order, given by the despatcher to Van Glahn as above quoted, was reasonable or unreasonable. The jury found that it was unreasonable. It is in proof that the order was in the customary form. It expressly required Van Glahn to protect himself against all trains. The rules of the company binding upon all its employees specifically provided in what way such protection should have been insured by him. His failure to observe those rules was thus the sole cause of the accident, and inasmuch as Van Glahn and Stark were fellow-servants, no liability arises. The company did its part, when it provided, as it did, adequate rules and appropriate orders to meet such emergencies as arose when it became necessary for Van Glahn to detach his engine from the west bound train and proceed over an east bound track to a station

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east of where his train was lying, in order to obtain water. Having done its full duty in the premises, the company is not liable to Stark's administrator, although it is conceded that Stark himself was wholly without fault.

For error in refusing to instruct the jury as requested by plaintiff in error and to direct a verdict for the defendant, the judgment of the court of common pleas is reversed, and because we see no possibility of a retrial of this case bringing out any facts which could vary this result, we proceed to render here the judgment which the court should have rendered in favor of the defendant below.

**STIPULATION CONCERNING JOINT USE OF DRIVEWAY
CONSTRUED.**

Circuit Court of Cuyahoga County.

WASHINGTON W. BOYNTON V. MAX STRAUSS AND CLAYTON
STRAUSS.*

Decided, September 23, 1908.

1. Reformation of a written instrument can only be had on the production of clear and convincing evidence of the intention of the parties and of the mutuality of that intention with regard to some phase of their contract which their writing fails properly to express.
2. In construing a written instrument which is open to more than one interpretation such effect will be given to it as the conduct of the parties at the time of its execution indicates they intended it should have.

Norton T. Horr and Stroup & Fauver, for plaintiff in error.
Webber, Wilford & Gillie, contra.

HENRY, J.; WINCH, J., and MARVIN, J., concur.

This is an appeal from the judgment of the common pleas court and the facts as disclosed in evidence before us show that the plaintiff purchased from Max Strauss, one of the defendants,

*Affirmed without opinion, *Boynton v. Strauss*, 82 Ohio State, 409.

the north half, substantially, of a parcel of land owned by Mr. Strauss on the west side of Washington avenue, in the city of Elyria, and in making that purchase a stipulation was contained in the instrument of conveyance concerning the joint use of a driveway. The driveway may perhaps be regarded as either a horseshoe carriage way, starting in at Washington avenue and going around to the rear of the premises and back again to Washington avenue by another entrance, or it may be regarded as being two driveways.

Nearly all of this horseshoe driveway is located upon the premises which the vendor retained, the south half of the entire parcel of land. It begins near the boundary line between the portion which he retained and the portion which he sold to the plaintiff; continues in a serpentine course westward, crossing the boundary line part way to the rear of the premises; continues on the part that was sold to the plaintiff and then crosses the boundary line between the parties and circles around the defendant's house, returning again to Washington avenue.

At the time of the sale and since the sale these two driveways (if they were two), or one driveway, if it be so regarded, constituted a means of continuous passage from either entrance on Washington avenue around to the other entrance or exit on the same street.

It should be said that at the time of the sale there were two houses upon the entire parcel, two residences, the south one of which is occupied still by the vendor, Mr. Strauss, the defendant here, or his family, he having since conveyed it by gift to his son, who lives with him; and the house upon the northern portion of the entire piece of land is now occupied by the plaintiff, the vendee, who purchased that portion of the premises from the defendant.

The provision in the deed upon this subject of the driveway is quite extensive and I shall quote it in full, because it is necessary to construe the language:

“The drive or carriage way to remain as now existing and located, a part of which passes from Washington avenue to the land of the grantor lying south of the land above described and thereby conveyed and for a short distance on said grantor's land

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when the said drive or carriage way passes on the land hereby conveyed to said grantee, to be used in common between the two places for a carriage or driveway, and said grantor conveys to said grantee said use of the parcel on his land covered by said driveway south of that hereby conveyed, and reserves the right to use for passage and repassage the remaining portion of said driveway on the land hereby conveyed. The corners of said driveway at Washington avenue to be marked by stones or iron piping sunk in the ground, as also the Washington avenue corners of the lot hereby conveyed with the corner on the east line one hundred feet north of the south line as above described."

Now the controversy which makes necessary a construction of this language is substantially this: For a long period after the conveyance was made the parties and those who did business with them seem to have used indifferently the whole or such part of this driveway or parts of it as they chose. The plaintiff, after he purchased the northern half of the property, built a barn in the rear of the residence thereon and in the construction of that barn the wagons by which the material was hauled were accustomed to pass over that part of the driveway which lies south of the Strauss land and across the boundary line between the two parties over into the parcel which the defendant sold to the plaintiff and on which the new barn was being constructed. Delivery men and others have used the entire driveway, if they chose to do so, making the complete circuit of the horseshoe. At the time the conveyance was made, it should be stated that there was no means, convenient at least, for anyone to drive in at one entrance and turn around so as to come out at the same entrance. Certainly there was no such place or means convenient to be used upon the plaintiff's portion of the entire tract. Since that time he has in front of his barn, provided a suitable place for turning around, so that one may drive on that part of the driveway between the two houses coming in at Washington avenue and drive up to the plaintiff's barn and turn around and come out again by the same way.

It is urged on behalf of the plaintiff, who claims still the right to make the complete circuit, that he has an easement in the entire horseshoe driveway, or of all that part of it, being the major part, of course, which is located upon the vendor's land, which

Mr. Strauss' son still owns, and Mr. Strauss having seen fit, for purposes of his own, to block up the southernmost portion of that driveway so that it can not now be used, this action is brought to vindicate the plaintiff's alleged right to use by way of easement appurtenant to the land purchased by him the entire horse-shoe driveway. It is vigorously claimed in his behalf that such use of the entire driveway physically connected with the residence property which he purchased from the defendant would, as a matter of law, and as an easement appurtenant to the land purchased, pass to him when he bought, and that such was his common law right under the circumstances as they then existed.

But we need not give consideration to that contention, for, as we look at it, the parties have themselves attempted to define in this instrument of conveyance precisely and exactly what their rights are. They have not left them unexpressed, and to the determination of the law as it may be applicable to the physical facts and the circumstances of the parties and their relations, but they have attempted to define them, and that definition supersedes whatever common law rights might have existed if they had given no such expression to their intention. The deed of conveyance, it may be remarked, was written, by the purchaser, the plaintiff, as the scrivener. He dictated that part of it which I have read and quoted, to a stenographer, who as he dictated it, wrote it upon a typewriter (for that portion of the deed is in typewriting), and directly thereafter he or some one in the presence of both the vendor and the vendee read it to Mr. Strauss, the vendor, and it was thereupon signed, witnessed, and acknowledged and by the plaintiff put upon record.

It is claimed that if this deed and the express provisions with regard to the driveway therein contained are insufficient to support the claim made by the plaintiff of an easement in the entire driveway, the complete circuit or horseshoe, he is entitled to a decree upon the evidence here to reform the deed in such manner as that it will definitely and clearly express the intention which he claims to have been the mutual intention expressed between the parties in the negotiations leading up to the purchase.

Upon that subject the testimony is somewhat conflicting. The plaintiff testifies that in the conversations leading up to the pur-

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chase between him and the defendant, the vendor, mention was made of the entire driveway, the whole horseshoe, and mention was made of it as being a convenient means to enable guests of either of the parties, should they have a reception at either of their respective homes, to drive from Washington avenue by one entrance and obtain an exit by the other, and that it was contemplated by both the vendor and the vendee expressly in those conversations that both parties should have the use of the entire driveway. The wife of the plaintiff here corroborates, in some degree at least, perhaps wholly, the statement of her husband in regard to that matter. On the other hand, the defendant, Max Strauss, declares, and he is to some extent corroborated by his daughter-in-law who was present at some of the conversations at least, that no mention whatever was made of that portion of the driveway which is now in dispute and that the only reference to the driveway which is not in dispute made in the conversations between the parties was a reference to the portion which lay between the houses physically.

The rule of evidence with regard to the reformation of a written instrument for mistake is well known in this state by repeated decisions of our court of last resort to be that such reformation can only be had on the production of clear and convincing evidence of the intention of the parties and of the mutuality of that intention with regard to some phase of their contract which their writing fails properly to express; and in this state of the evidence in the case before us, applying that rule, in view of the irreconcilable conflict in the testimony of the parties, we are unable, if such relief be required in this case, to afford it. There can be no reformation, because the evidence does not clearly and convincingly indicate that the parties both intended that the deed should have expressed clearly and plainly that the entire circuit was to be used by both of right. If such expression is not contained in the language of the deed itself the plaintiff must fail, therefore.

Recurring now to the language of the deed, at first sight it appears that the driveway as intended by the parties and described in the deed is the sinuous or serpentine driveway between the houses, for it must be admitted that so far as the driveway

is described in terms the description relates only to that part of the driveway. But it is said that the language used by way of description of this portion of the driveway, is, by the express terms used, applicable only to a part of the whole driveway, in all of which an easement is expressly conveyed; and I will re-read the language giving the expression to that view:

“The drive or carriage way to remain as now existing and located.” * * *

It is now suggested that the force and effect of that comma is to begin a parenthesis, and there is not any further punctuation until the end of the parenthesis as suggested, to be presently indicated; “a part of which passes from Washington avenue to the land of the grantor lying south of the land above described and hereby conveyed and for a short distance on said grantor’s land when the said drive or carriage way passes on the land hereby conveyed to said grantee,” * * *.

And this latter comma, it is suggested, amounts virtually to the end of a parenthesis describing a part of the driveway, the whole of which the language of the deed is said to convey. And then the language of the deed proceeds: “to be used in common between the two places for a carriage or driveway,” * * *.

If we went no farther than this, if the deed contained no other language with reference to the driveway than what I have just now re-read, the suggestion having reference to the punctuation as thus pointed out, might indeed have some force. It might indicate that the driveway, which was, as it then existed, convenient to be used only in complete circuit, was intended to be so described as to give the vendee an easement in all of the entire circuit which was not upon the land purchased by him. Proceeding further, however, with the re-reading of this description, there are some very significant words which, in our judgment, qualify what goes before: “and said grantor conveys to said grantee said use of the parcel on his said land covered by said driveway south of that hereby conveyed, and reserves the right to use for passage and repassage the remaining portion of said driveway on the land hereby conveyed.”

Now, it is manifest that if the plaintiff’s contention is true, there are two parcels of the driveway on the defendant’s land

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in which he claims an easement, and yet the word "parcel" in the singular is used. I may recall to attention the fact that the driveway starts in on the defendant's land, passes over to the plaintiff's land, repasses to the defendants' land and back out on Washington avenue, so that there are two parcels on the defendant's land in which the plaintiff claims an easement, and yet the language of the deed specifically refers to but one such parcel in which an easement is conveyed to him. But going still further:

"The corners of said driveway at Washington avenue to be marked by stones or iron piping sunk in the ground, as also the Washington avenue corners of the lot hereby conveyed with the corner on the east line one hundred feet north of the south line as above described."

Immediately upon the completion of this purchase the parties employed surveyors and one of those surveyors, the one, perhaps, employed by the vendor, went forward with the work of establishing the boundary lines between the two parcels and establishing the corners of the driveway. Iron pipes were placed in the ground and they are there now, as indicated by the evidence, to mark the boundary line between the two properties and to mark the two sides of the one entrance of the driveway which is nearest that boundary line, but there are no iron pipes at the other entrance.

It is said it was immaterial to the plaintiff here where the other entrance was to be located, just so there was another entrance; but it was very material to him where the entrance nearest his property was to be fixed, because the line between them was near certain shade trees which it was very desirable that they should retain and it was very important that the driveway in its serpentine course should be fixed in such manner that the parties would know where it was located. This might take away some of the force of the inference which we draw from the acts of the parties in omitting to put iron pipes at the other entrance to the driveway; and yet, considering all of the language of the deed with reference to the driveway, and considering not alone what the intention of the scrivener, the purchaser, the plaintiff,

was, when he drew the deed, but also the idea which the vendor, the defendant Strauss, would gain from this language, we are constrained to interpret it as meaning what he says it did mean to him, viz; that the driveway or that portion of it physically between the two houses was the part in which the easement so far as that driveway lay upon the vendor's land was conveyed to the vendee.

The word "between" in the sentence "to be used in common between the two places for carriage or driveway" is of course, equivocal. It may mean physically between the two houses, between the two parcels, or it may be between in the sense of in common between the two proprietors. That is not convincing, but the singular number of the word "parcel" and the fact that only one of the two entrances was immediately staked off with iron pipes, the fact, too, that the description of a portion, the serpentine portion of the driveway physically between the houses, at first glance and without the construction by way of interpolated parenthesis, would convey to the casual reader the idea that only the serpentine portion between the two houses was intended to be described and conveyed leads us to the conclusion that Mr. Strauss might well have believed, as anyone would naturally infer, that this alone was included; and the parties, therefore, must be held to have meant by the language which they used only that part of the driveway which lies physically between the two houses.

The petition will therefore be dismissed.

I ought to say that the very learned and carefully prepared printed brief of the plaintiff has been of service to us in presenting fully his contention, and we think we have not missed his view; but we do not concur in it.

ACTION TO ENFORCE STOCKHOLDERS' LIABILITY.

Circuit Court of Summit County.

CORA B. NEVIN V. THE AKRON ENGINEERING COMPANY ET AL.*

Decided, October 8, 1908.

Corporations—Stockholders Liability—Limitations—Voluntary Dissolution.

The voluntary dissolution of a corporation under the provisions of Section 5674a, Revised Statutes, does not cause the eighteen months to begin to run within which an action upon the liability of stockholders must be brought, as provided in Section 3258a, Revised Statutes.

HENRY, J.; WINCH, J., and MARVIN, J., concur.

This action to enforce stockholder's liability was not begun within the eighteen months succeeding the voluntary dissolution of the defendant company, under Section 5674a, Revised Statutes, and the filing with the Secretary of State of a certificate thereof under Section 2789-31, Revised Statutes, but it was begun within eighteen months after plaintiff's claim was reduced to judgment and execution thereon returned unsatisfied. Under Section 3258a, Revised Statutes, it must have been begun, if at all, within eighteen months after plaintiff's claim against the corporation was in a condition to assert it against its stockholders.

The rule established by our Supreme Court, and subsequently observed by this court sitting in Cuyahoga county, in the case of *William C. Scofield v. The Excelsior Oil Co. et al.* precludes the assertion of any such claim against the stockholders of a corporation, however notoriously insolvent and out of business it may be, unless actually subjected to judicial liquidation, without the reduction of such claim to judgment against the corporation and the fruitless issue of execution thereon. This course was permitted in that case to be pursued pending the ac-

*Affirmed without opinion, *Akron Engineering Co. v. Nevin*, 84 Ohio State, 498.

tion, but the right to maintain the action was conditioned upon the observance of that procedure. On the facts, the plight of the defendant corporation here became very similar to that of the Excelsior Oil Co. We can not say here, any more than we could there, that the cause of action against the stockholders accrued prior to the return of execution unsatisfied on judgment rendered in favor of the plaintiff and against the corporation.

The voluntary dissolution under the statute can not alter the case, for the sections above referred to expressly confer this right of voluntary dissolution only on solvent corporations which have paid, or suppose themselves to have paid, all their debts. There is no presumption whatever of corporate insolvency or of the necessity of creditors' recourse to stockholders' liability, in such cases.

We think the present action is not barred but was seasonably commenced, and an interlocutory decree may be taken accordingly as usual in such cases.

ENGINE SOLD BUT DESTROYED BY FIRE PENDING DELIVERY.

Circuit Court of Summit County.

FREEMAN STROH ET AL V. ANTON PETERSON.

Decided, October 8, 1908.

Sale of Chattel—When Complete—Delivery.

Delivery is not essential to pass title to specific personal property sold, where nothing remains to be done to identify it or put it into a deliverable condition, unless a contrary intention is shown in the words or conduct of the parties. But when delivery by the seller at a stipulated place other than that of sale is customarily implied, or is expressly stipulated for an entire consideration which includes the purchase price payable on delivery, title and risk ordinarily remain with the seller, and he can not have his action for the price until such delivery is made.

HENRY, J.; WINCH, J., and MARVIN, J., concur.

The parties to this proceeding in error stand related as they stood below. The plaintiffs sold an engine which they had in

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use in Barberton and agreed to deliver it to the defendant in Akron. The latter was to send someone to participate in disconnecting the engine and getting it ready for transportation so as to know how to set it up again in the new location. Neither party was ready for the delivery to take place when the negotiations for the sale were consummated; but except as thus indicated nothing else remained to be done to put the engine into a deliverable condition. By agreement the buyer meanwhile made partial payments on the purchase price. Before the time for delivery arrived, however, the engine was destroyed by fire, and by mutual consent of the parties was sold by the plaintiffs for scrap. The action below was brought for the balance of the purchase price, and the defendant, denying liability, counter-claimed for the partial payments by him made. Judgment was rendered on the verdict of a jury against the plaintiffs and for the defendant in the amount of his claim.

Various rulings, on the admission of evidence, in the charge of the court, in the refusal of plaintiffs' requests, and in denying a new trial, are alleged here as error. Without discussing any in detail our views upon all the minor points in controversy, the main contention of the parties turns upon the question of law involved in the relation of the stipulated delivery to the transference of title and risk. There can be no question that by the law as declared in Ohio, in consonance with modern authority generally, delivery is not essential to pass title to specific personal property sold, where nothing remains to be done to identify the same or put it into a deliverable condition, unless a contrary intention is shown in the words or conduct of the parties. But where delivery by the seller at a stipulated place other than that of sale is customarily implied, or is expressly contracted for by the parties, for an entire consideration which includes the purchase price payable on delivery, title and risk will ordinarily remain in the seller and he can not have his action for the price until such delivery is made (*Cunningham Iron Co. v. Warren Mfg. Co.*, 80 Fed. Rep., 878). *True Terry v. Wheeler*, 25 N. Y., 520, is apparently the other way, but it is sharply distinguished in *Benjamin on Sales*, p. 677 (6th Ed.).

Now it is in evidence in this case that the parties made no express stipulation as to when the title and risk should pass. Nor did they evince any intention whatever on the subject except such as the law implies from the terms of the agreement as made. Their conduct both before and after the fire, with respect to insurance and other details of their business transaction, does indeed evince a somewhat natural uncertainty as to what that implication of law might be; but there is nothing in the evidence which was properly admitted nor in that alleged to have been erroneously admitted or excluded, which could alter the case. Practically the only material fact in controversy was whether the agreed price was \$410 for the engine delivered or only \$400 for the engine and \$10 for the delivery. By the court's charge the jury's verdict was properly made to hinge chiefly upon this distinction, and we see no reason to disturb it. The requests refused, though perhaps correct in themselves, would not have aided the jury in the determination of this issue.

Judgment affirmed.

VALIDITY OF CONTRACT FOR CARE OF IMBECILE.

Circuit Court of Cuyahoga County.

MARY KYSER V. GEORGE BENNER, EXECUTOR OF JOHN R. BENNER.*

Decided, October 8, 1908.

Implied Authority of Wife of Imbecile to Enter Into Express Contract for His Benefit.

The wife of an imbecile has implied authority to enter into an express contract to engage the services of an adult member of the family in the care of him and his household.

HENRY, J.; WINCH, J., and MARVIN, J., concur.

The sole error alleged here is in sustaining the demurrer to the second amended petition below. Mary Kyser, stepdaugh-

*Affirmed without opinion, *Benner, Excr., v. Kyser*, 83 Ohio State, 510.

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ter of the decedent, John R. Benner, then an imbecile under guardianship, was induced by her mother, the wife of said Benner, to leave other lucrative employment which she had, outside the family house, and to engage in the service of said Benner, helping to take care of him and of the household, in consideration of the express promise made in his behalf by his wife that she should be paid the reasonable worth of her services. Benner did not, and by reason of mental incapacity could not expressly authorize his wife to make this agreement; but the services were necessities which the wife had authority implied in law to obtain upon his credit in case of his failure, by himself or guardian so to do. Such was the case here; and the action below was brought to recover the reasonable value, according to agreement, of the services so rendered.

It was, however, successfully urged in the court below that under the authority of *Hinkle v. Sage*, 67 O. S., 256, no recovery can be had for services rendered in the home by a member of the family except under an express contract, and that in the nature of things Benner could not and did not enter into any express contract, nor during his incapacity could he confer authority upon an agent so to do.

While this is true, it is also true that the wife's authority in the premises arose not from any express authority conferred by her husband, but from the authority implied by law from the relation of the parties as husband and wife, the compelling exigencies of family life, and the duty of the husband to provide. The reason for the rule, instead of failing, becomes all the more urgent when the husband is under disability.

Nor is the wife's authority, as thus derived, limited to the making of implied contracts to charge her husband with the reasonable value of necessities supplied to her, or to the family, at her request. There is no reason why, in the exercise of her implied authority, she should not expressly pledge her husband's credit for the necessities which she so procures, if the law, on other distinct grounds, as here, requires that the agreement for any such necessary be express in order to be binding. There is no repugnancy in the express exercise of the implied authority to contract. In our opinion the petition states

a cause of action, and the demurrer should have been overruled. For error in sustaining the same the judgment below is reversed, the demurrer overruled and the cause remanded.

ACTION FOR WRONGFUL EJECTION FROM STREET CAR.

Circuit Court of Summit County.

THE NORTHERN OHIO TRACTION & LIGHT COMPANY V.
CHARLES PETERSON.

Decided, April 8, 1908.

Passenger on Street Car—Wrongful Ejection—Evidence as to His Feelings—Punitive Damages—Excessive Verdict.

1. In an action by a passenger for wrongful ejection from a street car, he may testify that when he was put off he felt "cheap and kind of ashamed of himself" as if he had "done something wrong."
2. Where a passenger in utter disregard of his rights, is forcibly ejected from a street car in such manner as to expose him to ridicule and to impute to him an attempt to commit a fraud by riding free, punitive or exemplary as well as compensatory damages may be allowed.
3. A verdict for \$500 for forcible ejection from a street car is excessive, where there are no specially aggravating circumstances and no evidence of a studied or systematic evasion of franchise obligations.

Rogers, Rowley & Rockwell, for plaintiff in error.

A. J. Wilhelm and Grant, Sieber & Mather, contra.

HENRY, J.; WINCH, J., and MARVIN, J., concur.

The defendant in error, Peterson, brought his action below to recover damages for unlawful ejection from a street car when he presented an imperfectly punched transfer. The conductor from whom he received it, having lost his punch, gave him the transfer in question with instructions to explain the circumstances to the other conductor who would honor it for him. This he did but was put off. He recovered a verdict and judgment of \$500.

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The first error assigned is in permitting Peterson to testify that when thus put off he felt "cheap and kind of ashamed of himself" as if he had "done something wrong." This direct testimony to his sense of humiliation and indignity was the best possible evidence of the fact in issue. It was neither an opinion nor hearsay. The fact that another than he who suffers perceives no pain, be it either physical or mental, affords no reason why the sufferer himself should not testify thereto, precisely as any witness may testify to any fact which has come under the observation of his senses whether anyone else was in a position to observe it or not.

The second error assigned is the giving of defendant in error's request:

"If you believe from the evidence that plaintiff was forcibly ejected from the car by defendant's conductor and the ejection was done in such a manner and accompanied by such language on the part of the conductor as to expose plaintiff to the ridicule of other passengers, and imputed to him an attempt to commit a fraud on the defendant by deceiving the conductor with a worthless transfer so as to ride free, you may award to plaintiff punitive or exemplary damages; that is, damages in addition to compensatory damages, for the purpose of punishing the defendant for the wrong done to plaintiff and to furnish an example to deter others from doing likewise. In awarding such, however, you should be extremely cautious and not go beyond the bounds of reason. You may take into consideration reasonable counsel fees to which plaintiff may have made himself liable in prosecuting his claim."

It is urged that this should have been qualified by inserting the condition that the ejection must have been wilful, or wanton, or in utter disregard of plaintiff's rights to authorize exemplary damages. But the truth is that if he was put off at all, under the circumstances indicated, his rights were utterly disregarded. There is no middle ground. It is urged further that the element of being falsely charged with attempting to deceive the conductor with a worthless transfer so as to ride free, was not in the plaintiff's petition and could not therefore be a proper element of recovery. But we think this was a view of the matter which the jury might well be authorized to take, if they should so find;

for, though not a necessary, it is a natural and legitimate deduction from the facts expressly in issue.

It was intimated upon the hearing that this request was open to the criticism that it takes for granted that the ejection was wrongful and that plaintiff's story of the preceding events was true; whereas in fact that story was for the jury to believe or disbelieve as they might. But on inspection of the bill we find the company's claim agent, a witness in its behalf, testifying that the transfer (which was in evidence) was in fact issued, in the condition in which it now appears, by a conductor, who, though present at the trial, was not offered by the defendant as a witness. It is evident that in this state of the case the plaintiff in error was not prejudiced by the court's assumption of a state of facts, which, though formally denied by the answer, was thus virtually conceded to be true to the extent indicated.

A like objection to a paragraph of the charge at page 93 of the bill is not well taken because it begins with the condition, "If you find for the plaintiff," and, therefore, does not contain any assumption which the court was not warranted in making in charging the jury.

The third error assigned consists in the court's refusal to charge on contributory negligence as requested. The requests are no doubt correct in law, but they have no application to the case made. Peterson knew that his transfer was imperfectly punched, but he relied on the conductor's assurance that it would nevertheless be honored. It is not a case of negligence at all, on either side.

The fourth error assigned is misconduct of counsel of plaintiff below in argument to the jury. There was evidently some misconduct. But a careful scrutiny of each item discloses that the improper language attributed to counsel in one or two of the exceptions taken is not expressly averred by the bill to have been spoken as charged. Another instance we think was sufficiently met by the court's ruling and caution to the jury and counsel. Still another did not amount to misconduct; and in the remaining instances the question was not saved, by the reservation of proper exceptions. Taking it altogether, while we have no tol-

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eration for misconduct of the sort here charged, no reversible error in this behalf is disclosed in this record.

The fifth and final assignment of error is that the verdict is excessive, evincing bias and prejudice on the part of the jury. We think this is true. This was not a specially aggravated case. There was no studied or systematic evasion of franchise obligations as to fares or transfers, on the part of the company.

The company is, of course, answerable for its agent's misconduct, but there is no showing that it inspired or desired such misconduct on the part of its agents in this case. There was no bodily injury inflicted upon Peterson in putting him off. It was all due to misadventure and misjudgment on the part of the two conductors—the one in losing his punch and in making the improvident and ill-judged substitute arrangement for the punching of the transfer in the regular manner, and on the part of the other conductor in not heeding a probable story that was told him by a passenger. To one or the other, or both, the wrongful conduct of the company in putting him off the car to which he was entitled to ride, is chargeable, of course. It was all due to misadventure and misjudgment on the part of two conductors, and not malice or ill-will. Yet the verdict is in amount what would suffice if all these were elements in the case. We think \$150 would cover actual damages and expenses of prosecuting this action, besides penalizing the company up to the full limit for its laxity and the injustice perpetrated, and unless the defendant in error will remit all of his original judgment in excess of \$150 the same will be reversed and remanded for error in refusing the motion for a new trial on this account. If remittitur is made the judgment will be affirmed.

**PAY OF COUNTY COMMISSIONERS WHILE SERVING ON
BOARD OF EQUALIZATION.**

Court of Appeals for Guernsey County.

**E. D. STONE V. STATE OF OHIO, EX REL ENOS, PROSECUTING
ATTORNEY.**

Decided, April Term, 1913.

*County Commissioners—Allowance for Services as Members of the
Quadrennial Board of Equalization—Section 5597 as Amended.*

County commissioners while serving as members of the quadrennial county boards of equalization are entitled to the compensation allowed by Section 5597, General Code, as amended 102 O. L., 279.

METCALFE, J.; NORRIS, J., and POLLOCK, J., concur.

Plaintiff is a member of the board of county commissioners of Guernsey county. While serving on the board of equalization Stone drew the *per diem* compensation provided by Section 5597, General Code, for services rendered as a member of that board. It is claimed that county commissioners while serving as members of county boards of equalization are not entitled to the additional compensation provided by that section, and that the only compensation to which they are entitled is that provided by Section 3001, General Code, which fixes their annual salaries. This suit was brought by the prosecuting attorney to recover back the amount paid Mr. Stone as such member of the board of equalization, and judgment was rendered against him in the common pleas court, and he prosecutes error here.

The whole question depends upon the proper construction of the sections of the general code above referred to. The annual board of equalization was created by Section 2804, Revised Statutes, and Section 2813a, Revised Statutes, provided for the compensation of the members. Section 897, Revised Statutes, fixed the annual salaries of the county commissioners, and Section 897-2 provides that the compensation fixed by Section 897 "shall be in full payment of all services rendered as such commissioners." Section 2813a provides that each member of the

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county board of equalization shall be entitled to receive for each day necessarily employed in the performance of his duties, including his duties as a member of the board of revision, the sum of three dollars. Section 2813 provided that the auditor, surveyor and commissioners shall compose the county board of equalization. So that before the adoption of the General Code, Section 897, Revised Statutes, fixed the commissioners' annual salaries, and Section 897-2, Revised Statutes, provided that the salaries so fixed should be in full payment for all services rendered as commissioner, while Section 2813a, Revised Statutes, gave to the commissioners, as members of the county board of equalization, an additional compensation of three dollars per day. The provision of 897 fixing the annual salaries and the provision of 897-2 that such compensation should be in full for all services rendered as commissioner, we find were inserted in those sections by amendment subsequent to the enactment of Section 2813a, and we are inclined to think that under the rule in *Thorniley v. State*, 81 O. S., 108, operated to repeal that section by implication. However that may be, on the 14th of February, 1910, the General Assembly adopted the General Code, which is a compilation and revision of the laws in force at that time. The work which Mr. Stone did, and for which he received the compensation which is sought to be recovered from him in this action, was after the passage of the General Code and the amendments hereafter referred to.

In the General Code, Sections 897 and 897-2, Revised Statutes, were re-enacted as Section 3001; and Section 2813a was re-enacted as Section 5597. It is undoubtedly the rule that where there is a general revision of statutes and existing provisions which may be in conflict are re-enacted simply as part of a scheme of codification, that they shall receive the same construction as they would have received before the revision, so that if there had been no further action of the General Assembly with regard to these particular sections excepting their re-enactment as parts of the General Code, we think we would be required to hold that Section 2813a was repealed by implication; but after the enactment of the General Code these sections were again taken up by the General Assembly and various amend-

ments made thereto. In Vol. 102 O. L., 514, Section 3001, General Code, was repealed and re-enacted with some slight amendments. On May 31st, 1911 (102 O. L., 198), Section 5597 was so amended as to give to the county surveyor, while acting as a member of the quadrennial board of equalization, five dollars per day, and to each member of the board his actual necessary expenses incurred in the performance of his duties as a member of such board; and the provision for the payment of a *per diem* of three dollars was left out, and the original section repealed, making by this amendment a complete change with regard to the compensation of members of such board. Again, in Vol. 102 O. L., 279, Section 5597 was re-enacted with the provision giving to members of the boards of equalization three dollars per day for their services as members of that board restored as the section originally stood. It is our duty to ascertain, if possible, in construing these statutes, the meaning of the law-makers. A familiar rule of interpretation is thus stated in 26 Am. & Eng. Enc. L., 216, "where there is in the same statute a particular enactment and also a general one which in its most comprehensive sense would include what is embraced in the former, the particular enactment must be operative and the general enactment must be taken to affect only such cases within its general language as are not within the provisions of the particular enactment."

As the law now stands we have one section of the General Code providing that the salaries of the county commissioners shall be full compensation for all services rendered by them as county commissioners. We have two sections both bearing the same number and both enacted on the same day. one of which provides a *per diem* for the surveyor and for the payment of the necessary expenses of all members of the board, while the other section of the same number provides for a compensation of three dollars a day for each member of the board. It will not help in the interpretation of these statutes to criticize the apparent carelessness with which they seem to have been so complicated. We must suppose that the Legislature did not intend to do an unreasonable thing, that it had an object in view in amending

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and re-enacting these sections. We must presume that the Legislature had knowledge of the provisions of Section 3301, General Code, and amended Section 5597. In the light of that knowledge if the Legislature did not intend that the members of the county boards of equalization should receive the compensation for their services provided by Section 5597, what possible object could they have had in mind in re-enacting that section in its original form after it had been repealed and amended with the provision for the compensation of the members of the board left out? It is reasonable to suppose that the intention was to provide extra compensation for the extra labor imposed upon the commissioners as members of the boards of equalization. It either means this, or it is a nullity and it is not a just presumption to assume that the General Assembly simply legislated for the sake of legislating and intending that its work should be meaningless. We think that under the provisions of Section 5597 as amended 102 O. L., 279, that the commissioners are entitled to the compensation therein allowed. Whether this section repeals Section 5597, as amended 102 O. L., 198, by implication, or what effect it has on that section we are not called upon to determine.

The judgment of the common pleas court is reversed.

**VALIDITY OF THE ACT RELATING TO RAILWAY AND
HIGHWAY CROSSINGS.**

Circuit Court of Cuyahoga County.

**THE AKRON, CANTON & YOUNGSTOWN RAILROAD COMPANY v. THE
CITY OF AKRON.**

Decided, June 30, 1909.

Constitutional Law—Railroad Crossing Act.

Section 4 of an act to provide how railroad and highway crossings may be constructed, as amended April 2, 1908 (99 O. L., 58), is constitutional and valid.

Grant, Sieber & Mather and Jonathan Taylor, for plaintiff in error.

N. M. Greenberger and Allen, Waters, Young & Andress, contra.

HENRY, J.; MARVIN, J., concurs; WINCH, J., dissents.

A preliminary question on this appeal involves the constitutionality of "An act to provide how railroad and highway crossings may be constructed," particularly of Section 4 of said act, as amended by 99 Ohio Laws, page 58.

It is claimed that this section is invalid because it attempts to confer legislative power upon the court of common pleas and to enable that court to create the right in railroad or municipal corporations, or both, whereby, under certain circumstances, a railroad and a highway may be made to intersect at grade. The general policy of the state, as declared in previous sections of the same act, is to prohibit the construction of grade crossings, and to require a separation of grades in all cases thereafter arising, where railroads and highways intersect.

Section 4 attempts to provide for exceptions to this rule, and it authorizes the court of common pleas, upon proper application by either a railroad or a municipal corporation, to make an order, permitting a crossing at grade, upon allegation and proof that such construction is reasonably required, first, "to accommodate

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the public," or second, "to avoid excessive expense in view of the small amount of traffic on the highway or railroad, and considering the future uses to which said highway may be adapted," or third, "in view of the difficulties of other methods of construction," or fourth, "for other good and sufficient reasons."

It is clear that if the right to cross at grade in such cases is by the terms of this statute to be created by the court, the statute is invalid, because it attempts to invest a judicial tribunal with legislative power. On the other hand, if the statute is to be construed as a legislative grant of power to cross at grade, subject in its exercise to the determination by the court of the existence of some one of the statutory conditions, upon which it is made to depend, the law is valid, for the sole function thus imposed upon the court is a judicial and not a legislative function.

The phraseology of the statute is such as to invite at first reading the former construction, but we are mindful of our duty to uphold the statute, if it be at all susceptible of the second construction. Heeding this rule we should still incline to the former construction if the case were entirely one of first impression, but the Supreme Court has upheld the validity of a statute which presents similar difficulties in the case of *Fairview v. Giffce*, 73 Ohio State, 183. That statute provides, in substance, that the owner of unplatted farm lands lying within the corporate limits of any municipality may file a petition in the court of common pleas, setting forth the reasons why such lands should be detached, and upon notice to the municipal authorities, and a hearing of the cause, the court may, in its discretion, enter an order that the lands be detached from such municipality, provided the same may be done without material detriment to good government. No express words were employed to indicate that the Legislature intended to create a right to such detachment, nor was there any enumeration of the conditions upon which the exercise of such right was made to depend, yet the Supreme Court read these things into the act, and held that the Legislature had created a legal right in the owners of unplatted farm lands, lying within the corporate limits of a municipality, to have the same detached, where good reason exists, one manifest reason therefor being to relieve such owners from the burdens

of unfair taxation. When, therefore, the court upon application, should find that such reason existed and no material detriment to good government would arise from detachment, it could not properly withhold the order permitting such detachment, for the discretion given to the court by the statute was a purely judicial discretion.

We forbear extended discussion of the authorities cited in that case as well as of those cited to us by counsel in this case, and content ourselves with stating merely that a majority of the court are unable to escape the application of the rule of *Fairview v. Giffie* to the case before us.

We hold Section 4 of the act to provide how railroad and highway crossings may be constructed is constitutional and valid, and the objection to the sufficiency of the petition and to the introduction of evidence thereunder is overruled.

A master commissioner will be appointed to examine the matter of the application presented by the petition herein and to report the evidence taken by him, together with his conclusions of law and of fact as to whether or not the grade crossing petitioned for is reasonably required for any of the causes enumerated in the act.

We believe that the general policy of this state in respect to the abolition of grade crossings is such that such crossings should not be permitted unless a clear case under the statute is made out.

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CLAIM OF OVERPAYMENT IN SUIT ON AN ACCOUNT.

Circuit Court of Cuyahoga County.

THE GEORGE J. RENNER BREWING CO. V. DENNIS MICHYNAK.

Decided, January, 1909.

Cross-Petition—Overpayments on Open Account Made by Mistake—No Demand for Repayment Necessary.

In an action on an account, with counter-claim for overpayments, where it appears that the overpayments were not voluntary, but were made by mistake, while the account was still open, no demand for their repayment is necessary to entitle the defendant to enforce repayment.

Grant, Sieber & Mather, for plaintiff in error.

Otis, Beery & Otis, contra.

HENBY. J.; WINCH, J., and MARVIN, J., concur.

The action below was upon an account for beer sold and delivered to the defendant in error, a saloon-keeper, by the plaintiff brewing company. The former counter-claimed for overpayments made upon said account and recovered a verdict and judgment.

Error is assigned upon the insufficiency of the counter-claim; but we think that the record sufficiently shows that the overpayments were not voluntary and were made by mistake. No demand for their repayment was necessary before suit brought, for the account was open, with debits and credits on each side.

Error is also assigned upon the admission of testimony of plaintiff's witness, Mary Kinney, who as a bookkeeper had examined the books of both parties and testified to her computations made therefrom. We have carefully read her testimony and find it competent under the rules laid down in *Lawson on Expert and Opinion Evidence*, p. 186.

It does not appear that her written summary of the computations was received in evidence after objection made thereto.

Her oral testimony as to the fact of overpayment is, however, clear, and though the amount is apparently stated at one point in the record to be \$2.40 (a sum less than the verdict), it is elsewhere made plain, not only in her testimony but, somewhat less clearly, in that of the defendant himself, that the final balance is substantially as the jury found it to be.

There is indeed an irreconcilable conflict in the whole evidence as to the true state of the accounts between the parties, but we can find no sufficient reason to disturb the verdict as being against its weight.

The charge of the court is complained of, first, because of the term "preponderance of evidence" was used without definition; but the court mentioned as his reason for omitting generalities that the jury had been sitting in many cases, and counsel did not ask for elaboration.

It is further complained that the court, without warrant from the evidence, imported into the issue "items in dispute in regard to deliveries of beer"; but the record shows plainly that there was such dispute, not indeed as to the fact of deliveries, but whether certain of them did not antedate a former full settlement.

The court, it is also urged, committed error in referring to drivers' discounts on collections, and corrections of credits to the defendant so as to include the same; but the testimony of Miss Kinney and the books of the parties clearly raise the question of fact to which this instruction properly applies. It was for the jury to decide whether there were any such rebates not credited.

We find no error in the record and the judgment is affirmed.

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Summit County.

UNAUTHORIZED PURCHASE OF A BOWLING ALLEY.

Circuit Court of Summit County.

**THE AKRON BREWING COMPANY V. THE BRUNSWICK-BALKE-
COLLENDER COMPANY.**

Decided, January, 1909.

Implied Authority of Agent of Brewing Company.

There is no implied authority in the manager of a brewing company to order a bowling alley installed in connection with a saloon.

HENRY, J.; WINCH, J., and MARVIN, J., concur.

The action below was brought by the defendant in error on an account to recover the price of a bowling alley installed in connection with the saloon of one Eliza Lee upon the order of William Fuchs, manager of the plaintiff in error. The main issue was upon the agent's authority. The evidence discloses no express authority to make this purchase; nor, in view of the provisions of Section 7000, Revised Statutes, prohibiting bowling alleys in connection with saloons, is such authority to be inferred. There was no express ratification, nor, since the plaintiff in error did not itself get and has not used the bowling alley, is any implied.

The judgment below, not being sustained by sufficient evidence, is reversed and the cause remanded.

ACTION FOR JEWELRY LEFT IN SLEEPING CAR.

Circuit Court of Summit County.

THE PULLMAN COMPANY V. GEORGE H. GOBLE, ADMINISTRATOR.

Decided, January, 1909.

Liability of Sleeping Car Company for Jewelry Left in Berth—Evidence.

A verdict against a sleeping car company for the value of jewelry left in a berth by a passenger and alleged to have been stolen by the porter, will be set aside where the only evidence that the porter stole the jewelry is the fact that he, in common with passengers on the car, had an opportunity of stealing it.

Otis, Berry & Otis, for plaintiff in error.*G. M. Anderson*, contra.

HENRY, J.; WINCH, J., and MARVIN, J., concur.

The action below was brought to recover the value of personal jewelry alleged to have been stolen by the porter of a sleeping car from the defendant in error's intestate, a passenger. On retiring, she put the jewelry in a bag by her side between the sheets of her lower berth, and neither saw nor thought of the same again till several hours after leaving the train the next morning at dawn. The porter, appearing at her berth, waked her before light, and repeatedly urged her to make haste in rising and completing her toilet. He warned her that the train was near her destination, and rapped loudly several times at the door of the woman's dressing room to which she had repaired. The lights in the car having failed he had provided her with a candle, and later at her request, he searched in and about her berth for some of her hat pins. She was ready in ample season to leave the car when her stop was reached; and, after she had alighted, the porter passed her hand baggage to her from the car steps, but did not carry it to the waiting room as she desired.

Meanwhile three other passengers were aroused by the noise thus made; and when the porter returned, one of them saw him

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apparently making up the berth which had been vacated, though it seems that the upper berth was still occupied. There may be some other slight circumstances relied on to cast suspicion on the porter; but, aside from his more convenient opportunity to steal the jewelry, there is scarcely more reason to charge him with such theft than any of the other occupants of the car. Neither he nor they saw or knew of the jewelry beforehand. The jury's verdict is purest guesswork, and because it is not supported by sufficient evidence, the judgment is reversed and the cause remanded.

STATUS OF FRATERNAL ORDER TRUSTEES.

Circuit Court of Summit County.

THE AKRON PRINTING & PAPER COMPANY V. THE SUPREME
COUNCIL OF THE CHEVALIERS ET AL.

Decided, January, 1909.

Trustees of Fraternal Order Not Personally Liable for its Debts.

The provision of Section 3261, Revised Statutes, that the trustees of a corporation created for a purpose other than profit shall be personally liable for all debts of the corporation by them contracted, has no application to fraternal orders incorporated under the laws of the state.

HENRY, J.; WINCH, J., and MARVIN, J., concur.

The plaintiff company seeks to subject the liability of trustees of the defendant fraternal order, which is insolvent, to the payment of its account against the order. Section 3261, Revised Statutes, provides that "the trustees of a corporation created for a purpose other than profit, shall be personally liable for all debts of the corporation by them contracted." The main issue is whether this general provision in the first chapter of Title II on Corporations applies to Sections 3631-11 to 3631-23a, in the tenth chapter of the same title, where the act respecting fraternal orders (92 O. L., 360, replaced later by 97 O. L., 420) is inserted in Bates' Statutes.

Originally this act (92 O. L., 360) did not purport to stand related to any portion of the Revised Statutes, except that it provided negatively that fraternal orders should not "be required to make any report under this or any other section of the insurance laws," thereby referring evidently to said chapter 10 of Title II aforesaid, entitled "life insurance companies." It was plainly intended to be an independent act for the government of fraternal beneficiary associations. And though the amended act (97 O. L., 420) refers expressly to the sectional numbers annexed by Bates' Statutes to the original act, we attach no importance to that circumstance. Any such association was by the act "declared to be a corporation, society or voluntary association, formed or organized and carried on for the sole benefit of its members and their beneficiaries." It was further provided that "Each association shall have a lodge system, with ritualistic form of work and representative form of government, and may make provision for the payment of benefits," etc. For an existing unincorporated association the assumption of a technically corporate character under the act seems to have been optional, and the manner of corporate organization therein provided differs materially from that prescribed by the general corporation laws, though it is akin, at least, to that of non-stock corporations not for profit.

As to any association which should assume this corporate character, the provision of Section 3 of Article XIII of the Constitution, both before and since its recent amendment regarding the security to be prescribed by law for dues from corporations, was and is met by the requirement that the payments of benefits and expenses shall be made out of a separate fund "derived from assessments, dues, or other payments collected from its members." The amended act, it is true, expressly provides that officers shall not as such be personally liable for the payment of the benefits; and from this we are asked to infer that they are liable for expenses under Section 3261. While there is force in this argument, it has no application to the original act, and we think there is no sufficient intention manifested in the amended act to enlarge the liability in this behalf. On

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the contrary, the provision in Section 1 of the original act, that "such associations shall be governed by this act" is amplified by Section 4 of the amended act so as more clearly to exclude the applicability of other laws by prefixing thereto the words "except as herein provided."

While the case before us is by no means so clear as *Bernard v. Schwartz et al*, 22 C. C., 147, and *The Mfr's Fire Ass'n of Akron et al v. The Lynchburg Drug Mills*, 8 C. C., 112, we nevertheless apply the rule laid down in those cases and hold that Section 3261 has no application to fraternal orders incorporated under these statutes. The petition will be dismissed.

ENFORCEMENT OF UNIFORM RESTRICTIONS ON LOT OWNERS.

Circuit Court of Summit County.

HANNAH CARMICHAEL V. PHILANDER D. HALL ET AL.

Decided, January, 1909.

Uniform Restrictions as to Lots in an Allotment—Enforcement of Same Against Alloters—Injunction.

The rights of a purchaser of a lot in an allotment as to which the owners have adopted a uniform scheme of restrictions and limitations, made binding upon her by covenant in her deed, but not therein expressly covenanted to be binding upon the allotment owners, to compel said owners to impose similar restrictions upon all lots sold by them does not rest in contract, nor consist of an estate or easement in other lots, but flows from the inequity of allowing the abandonment of a uniform scheme of restrictions after the owners of the allotment have sold part of the lots on the faith of its enforcement as held out by them to the particular purchaser or the public at large.

HENRY, J.; WINCH, J.. and MARVIN, J., concur.

Judgment below was entered upon demurrer sustained to the petition. The action was brought by the purchaser of the first lot sold in the defendants' park allotment, to enjoin them from violating their uniform scheme of restrictions and limitations

applying to said allotment as held out to plaintiff and made binding upon her by covenant in her deed at the time of her purchase. but not therein expressly covenanted to be binding also upon the defendants. The demurrer is founded upon the assumption that a writing is necessary to create in the grantee under such circumstances a reciprocal right, because such right is an interest or easement in the land under the statute of frauds. The truth is that plaintiff's right need not rest in contract nor consist of an estate or easement in the remainder of the allotment. Her rights flow rather from the inequity of allowing the abandonment of a uniform scheme of restrictions after the owners of an allotment have sold part of the lots on the faith of its enforcement as held out by them to the particular purchasers or the public at large. And even if such an equity in the grantee be regarded as an equitable estate in the allotment there is nothing in our statute of frauds requiring it to be evidenced by a writing. We have more than once enjoined violations by allotment owners of their uniform schemes of restrictions under just these circumstances.

The judgment is reversed and the cause remanded with instructions to overrule the demurrer to the petition.

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Medina County.

ACTION ON A FIRE INSURANCE POLICY.

Circuit Court of Medina County.

THE UNION INSURANCE COMPANY V. CATHERINE BILLMAN.*

Decided, 1909.

Fire Insurance Policy—Waiver of Prompt Payment of Premium—Negligence of Company's Agent.

There may be a recovery on a fire insurance policy, though the premium was not paid to the company's agent until after due and after the fire, where it is shown that the company's agent received the premium and remitted it to the company, which returned it to the agent with instructions to refund it to the insured, but the agent failed to tender it to the insured until six or eight months after the fire and long after suit brought, such tender then being refused.

J. W. Seymour, for plaintiff in error.*John O. Lisey and Grant, Sieber & Mather*, contra.

HENRY, J.; WINCH, J., and MARVIN, J., concur.

The relation of the parties here is the reverse of their relation below. The defendant in error recovered a verdict and judgment on an insurance policy for a partial loss by fire. Her third amended petition, which embodied the policy, shows that after the fire she paid to the plaintiff in error's agent an assessment which was then so long overdue that (as decided on a former review of this case) her insurance stood suspended. But the plaintiff alleges waiver. The agent remitted the money to his company, which, however, returned to him the portion covering the destroyed property, with instructions to return it to the insured. This he failed to do until six or eight months after the fire, and long after suit brought, and then, upon tender, the insured refused to receive it. This delay was shown by the company's own witness and stands undisputed; and the other facts above recited are conceded.

*Affirmed without opinion, *Union Insurance Co. v. Billman*, 82 Ohio State, 451.

There could be no issue as to the making of the assessment or the giving of notice, in view of the admissions in the third amended petition.

The plaintiff's ownership and the value of the property destroyed were disputed, but were found by the jury upon competent evidence and upon a charge which was as to these matters correct. The court's charge as to waiver contained no error prejudicial to the company. *Union Mutual Life Ins. Co. v. McMillen*, 24 Ohio St., 67; *Phoenix Ins. Co. v. Heffler*, 2 C. C., 131; 2 *Joyce on Insurance*, 1375, note 217; *Phoenix Ins. Co. v. Tomlinson*, 125 Ind., 84; *Phoenix Ins. Co. v. Lansing*, 15 Neb., 494; *Union Fire Ins. Co. v. Block*, 109 Pa. St., 535; *German Ins. Co. v. Shader* (Neb.), 60 L. R. A., 918; *Johnston v. Phelps Co.*,—; *Farmers Mut. Ins. Co.* (Neb.), 56 L. R. A., 127; *Schoneman v. Western Horse & Cattle Ins. Co.*, 16 Neb., 406; *Western Horse & Cattle Ins. Co. v. Scheidle*, 18 Neb., 495; *Phoenix Ins. Co. v. Dungan*, 37 Neb., 473.

The corporation is bound by its agent's negligence. *Citizens Savings Bank Co. v. Blakesley*, 42 O. S., 645.

Though the burden of proving the alleged waiver was upon the plaintiff (*The Eurcka Fire & Marine Ins. Co. et al v. Baldwin*, 62 Ohio St., 368, 383; *Mehurin v. Stone*, 37 Ohio St., 49, 50), and ordinarily in such case the court can not direct a verdict for the plaintiff, nor refuse a motion for a new trial after a verdict for plaintiff founded upon an erroneous charge, yet this being a case wherein the facts are conclusively determined in a manner not affected by material error, the application of the law to such facts could only result in the verdict which the jury in fact rendered (*Cinti Gas & Elec. Co. v. Archdeacon, Admr.*, 80 Ohio St., 1) and the judgment is affirmed.

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Cuyahoga County.

WOMAN CUSTOMER INJURED IN DEFENDANT'S STORE.

Circuit Court of Cuyahoga County.

THE M. O'NEIL & CO. V. MARY PERRY.

Decided, October 11, 1909.

Personal Injuries—Negligence—Married Woman Whose Husband Has Deserted Her May Recover for Loss of Own Services.

In an action for damages resulting from personal injuries, a married woman, whose husband has deserted her, may recover for loss of her own services.

Musser, Kimber & Huffman, for plaintiff in error.*Skiles, Green & Skiles* and *W. R. Talbot*, contra.

HENRY, J.; WINCH, J., and MARVIN, J., concur.

Mrs. Perry while a customer in defendant's store, stepped into an opening in the floor in one of the corridors and sustained injuries to her ankle. The hole was open for the purpose of putting in a water pipe for a sprinkling system in the store. Mrs. Perry recovered a verdict and judgment of \$3,000 in the court below. She claims that the hole was not properly barricaded and that the place was poorly lighted. Much evidence both ways on these points was produced below, and there are some inconsistencies in Mrs. Perry's own testimony, but we can not say that the weight of the evidence is manifestly inconsistent with the jury's verdict, in regard either to the company's alleged negligence or the alleged want of care on the part of the plaintiff below. Her view of the hole, even in the place where sufficiently lighted, seems to have been so obstructed by the presence of some other woman, also a customer in the store, that we can not say she would have observed it by the proper use of her senses. So, too, while there may have been some barricade before the hole, she appears to have walked into it, not directly, but by reason of changing her direction in response to somebody's call and suggestion as to where she might find the elevator which she was seeking.

It is also claimed that the jury's verdict is contrary to the weight of the evidence in respect of the issue made by the pleadings as to the validity of a certain release of liability signed by Mrs. Perry. She is unable to read and write, except to the extent of signing her own name. She declares that the release was not properly read to her, but that only the first words thereof, which recited the receipt by her of money from the plaintiff in error were read. Whatever doubts we may have about the truth of her testimony in this regard, we are not warranted by the direct conflict of evidence on this point in saying that the jury's finding is plainly and manifestly wrong.

The only remaining assignment of error relates to the measure of damages. It is said that the plaintiff was allowed to prove and to recover for the loss of her own services, etc., which in law belonged exclusively to her husband. But the truth is, as shown by her testimony, that her husband deserted her about two months after the accident, and it is admitted that the amounts paid her from time to time before suit was brought were intended to and did pay the wages of a servant whom she employed during that period to render those services in so far as they could form an element of her recovery in this action, and we must presume that the jury has not allowed a second compensation for the same loss of service. The husband by his desertion clearly forfeited whatever rights in this behalf he might have had, covering the period that has since elapsed. The court's charge is not open to the criticism that he expressly instructed the jury that Mrs. Perry might recover for loss of service, and as for the evidence in that behalf which was admitted, we think the jury could not have failed to gauge it correctly when all the facts were considered together. There was no error in this particular.

Neither is the verdict so clearly excessive as to evince passion or prejudice on the part of the jury. It is true that a former jury awarded only about one-quarter of the amount allowed by this one, but in the meantime the effects of Mrs. Perry's injuries have persisted and it appears from the testimony of the physicians that they are likely to be permanent.

The judgment below is affirmed.

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Summit County.

WANT OF JURISDICTION TO VACATE JUDGMENT.

Circuit Court of Summit County.

WILLIAM SCHLIEWE v. W. FRANK POOLE.

Decided, October 11, 1909.

Vacating Judgment Obtained by Fraud—Motion Filed More Than Three Days After Next Term.

It is error to vacate a judgment for fraud in obtaining it on motion filed more than three days after the beginning of the next term of court.

Holloway & Chamberlain, for plaintiff in error.*J. A. H. Myers*, contra.

HENRY, J.; WINCH, J., and MARVIN, J., concur.

This litigation originated in a justice's court. After judgment it was appealed to the common pleas court, where petition was filed September 26, 1908, and for want of answer or demurrer, judgment was rendered December 21, 1908, during the September term of court. A motion to vacate said judgment was filed February 13, 1909, more than three days after the beginning of the January term; and later this motion was granted, upon the ground set forth in the motion. This ground was that the parties had agreed that no pleadings should be filed nor anything done in the action, pleading negotiations for settlement, but that during the progress of those negotiations the plaintiff, without the knowledge of the defendant, filed his petition and subsequently took judgment.

The error here assigned is that the court of common pleas had no jurisdiction to vacate a judgment upon a motion filed more than three days after the beginning of the next ensuing term of court. This is true with respect to the third ground mentioned in Section 5354 of the Revised Statutes for vacating or modifying judgments after term, to-wit, "For mistake, neglect, or omission of the clerk, or irregularity in obtaining a judgment or order."

It is not true of the fourth ground mentioned in said Section 5354, *i. e.*, “for fraud practiced by the successful party in obtaining the judgment or order.” See Sections 5357 and 5358.

Follett v. Alexander et al, 52 Ohio St., 202, affords an illustration of such irregularity in obtaining judgment as will authorize its vacation on motion filed more than three days after the commencement of the next succeeding term.

Ralston v. Wells, 49 Ohio St., 298, affords illustration of fraud practiced by the successful party in obtaining judgment, necessitating the filing of a petition and the issuance of summons, if the proceedings to vacate are begun at a subsequent term.

The case before us comes within the latter category, and the application here having been made by motion instead of by petition, it is apparent that the court below was without jurisdiction to entertain it.

A further reason why the judgment below should be reversed is found in the non-observance of Section 5360, Revised Statutes, which provides that, “A judgment shall not be vacated on motion or petition until it is adjudged that there is a full defense to the action in which the judgment is rendered,” etc. *Follett v. Alexander et al, supra*.

The vacating of the judgment in this case was therefore erroneous and void for want of jurisdiction.

The judgment to that effect will therefore be reversed and the original judgment restored in full force and effect.

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Summit County.

INJURY TO A TENANT THROUGH HER OWN NEGLIGENCE.

Circuit Court of Summit County.

SARAH A. DAWSON V. FRANK A. SEIBERLING.

Decided, October 11, 1909.

Landlord and Tenant—Personal Injuries—Landlord Not Liable, When.

A tenant of part of a building can not recover damages against her landlord for personal injuries received by her from the falling over upon her of a heavy radiator standing unfastened to anything in a common hallway of the building, where the evidence points more strongly to her own negligence than to any other cause of the accident.

Musser, Kimber & Huffman, for plaintiff in error.*Slabaugh, Seiberling & Huber*, contra.

HENRY, J.; WINCH, J., and MARVIN, J., concur.

The plaintiff in error rented lodgings in the building of the defendant in error. She left her apartment and came out into the common hallway, the control or custody of which the defendant retained, and attempted to shut the front door in order to bar out a dog which annoyed her by barking and running in and out of her apartment. A radiator weighing about 200 pounds stood on the floor back of the open door; it was three or four feet high and one foot broad at its base; it was not fastened to the floor or wall. The door was sometimes held open by a brick. After the accident it appeared that someone had tied it open by a cord attached to the knob and to the radiator, at least the broken parts of such cord were found after the accident, one part tied to the knob and the other part to the radiator. Somehow the radiator fell over while the plaintiff in error was trying to move the obstruction, whatever it was, and her ankle was caught and crushed thereunder. A verdict for the defendant below (defendant in error here) was directed at the close of plaintiff's evidence. We think there was no error in this ruling. The plaintiff in error wishes us to take the view that the radiator was so dangerous a thing, when left standing upon its base

unfastened, as to make the question of negligence in so leaving it a matter for the jury to decide, particularly in view of the possibility that the door knob might somehow engage with it in such a manner as to pull it over when the door was closed. We do not take this view. A radiator of this description is not in so unstable equilibrium as to fall over without some force being exerted to push or pull it over and the possibility of the knob of the door engaging with the radiator, or the door itself, when open, pushing it over against the wall in such manner that when the door was closed it would not merely recover its upright position, but balance over in the opposite direction, and so fall to the floor, is a speculation too remote to require submission to a jury. Moreover it is reasonably evident that the plaintiff in error, supposing that the door was obstructed by a brick on the floor, when in fact it was tied to the radiator, exerted such force in trying to shut the door as to pull the radiator over. This, at least, seems to us to be the most reasonable supposition from the evidence.

It does not appear that the defendant in error was in any way responsible for the door being thus tied, if it was tied. The judgment below is affirmed.

DAMAGES FOR INJURIES TO A PASSENGER.

Circuit Court of Lorain County.

THE CLEVELAND SOUTHWESTERN & COLUMBUS RAILWAY COMPANY
V. SANFORD G. GIBSON.

Decided, December 28, 1909.

Excessive Verdict—Passion or Prejudice of Jury Must be Shown.

A judgment in a personal injury damage case should not be set aside because of a claim that the verdict is excessive, simply because the reviewing court is of opinion that it would not have awarded so much, no passion or prejudice on the part of the jury being shown.

HENRY, J.; WINCH, J., and MARVIN, J., concur.

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This proceeding in error is brought to reverse a judgment obtained by the defendant in error, Gibson, against the plaintiff in error, the C. S. W. & C. Railway Co., for damages on account of injuries sustained by the former while a passenger in one of its cars, which came into collision with another of its cars.

Three errors are alleged:

First, that the verdict of \$4,500 is so excessive as to be indicative of passion and prejudice on the part of the jury. The bill of exceptions consists largely of testimony of physicians. There is a sharp conflict in the evidence, the plaintiff below claiming that his injuries are both varied and permanent, whereas the defendant below contended that he sustained no permanent injuries whatever. A great deal of evidence was also produced to impeach the reputation of the plaintiff below for truth and veracity, insomuch that we wonder that the jury nevertheless appeared to give some credence to his testimony. Apart from this, however, we have examined enough of the medical testimony to see not only that the doctors disagree, but that their diagnoses of Gibson's injuries are utterly irreconcilable. If the jury believed the testimony of his physicians, as doubtless they did, the verdict should not be reversed as being against the weight of the evidence; it would be simply to embrace the other horn of the dilemma. If we were to require a remittitur it would be upon the theory that the medical testimony on neither side is to be believed, but that the truth lies part way between. The solution of difficulties of this sort is pre-eminently for the jury. We are not permitted to set their verdict aside simply because we would have rendered an opposite verdict, nor yet because the amount of damages is greater than we should have awarded upon the same evidence, but only when we are brought to the conclusion that the jury must have been actuated by passion or prejudice. This we are far from being able to say in the present case.

The second assignment of error is upon the failure to grant a new trial because the verdict is not only contrary to the weight of the evidence, but because it is not supported by any evidence. The theory of the plaintiff in error is that the accident was due not to its negligence but to an act of God. The negligence, if

any, was that of the motorman of the car which collided with the one in which Gibson was a passenger. He was aware that he was approaching the place where he was to meet two cars going in the opposite direction, but when he came near enough to make it necessary to apply his air-brakes he found that they refused to work, and before he had time to take other measures, such as to throw on the power and reverse the motor, the collision occurred. It was afterward discovered that the reason why the air brakes would not work was that a hole had been burned in the air hose line underneath the car, and this in turn was caused by the last of three flashes of lighting which had struck the car a short distance before it came to the scene of the collision. The motorman testified that he was aware of the fact that the car had been thus struck and that he had twice restored the circuit overhead when it was blown out by strokes of lightning. But though he had tried his brakes and found them all right at the B. & O. crossing, two or three minutes before the accident, he had no knowledge that they had been put out of commission by the lightning stroke thereafter, until it became too late to prevent the collision.

If the jury believed this story it would undoubtedly have authorized a verdict for the defendant below. The question was put squarely before them by proper charge of the court. It was in testimony that accidents to the airhose are extremely rare from this cause, but that the motorman might at any time by trying his brake have discovered that it was out of order. Unless the jury were prepared to say from this evidence that it rebuts the presumption of negligence which the law attaches to a collision, to fasten liability upon a common carrier of passengers for damages to a passenger which are caused by such collision, their verdict for the plaintiff below was of course warranted. The motorman's credibility as a witness was a question for their determination. The accuracy of his memory and recital of the facts was also a question for them to take into consideration. They had, in short, to balance the presumption of law against the excuse which the motorman's testimony affords. They found that excuse insufficient, either because they did not believe the motorman's testimony, or because they thought that

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ordinary care would require him to test his brakes frequently during the electrical storm.

As on the question of the amount of the verdict, already considered, it may be said again here that we are not authorized to reverse a judgment because a contrary verdict might well have been rendered, or even because we should have rendered such contrary verdict had we been in the jury's place. It is idle to say that there is no evidence to support the verdict, when the presumption of law alone, if unrebutted, would sustain it. It is likewise impossible for us to say that the testimony of the motorman was binding upon the jury and afforded such complete rebuttal of the presumption as to necessitate a judgment against the plaintiff below for failure to sustain a burden of proof that rested upon him.

The third error assigned is newly-discovered evidence reflecting upon the character of the injuries sustained by the defendant in error and upon his veracity. This was, of course, cumulative, and therefore it was within the sound discretion of the court below to determine whether a new trial should be granted because of such additional evidence newly discovered.

Furthermore, we think the court below may well have inferred that the evidence would have been discovered in time to have been produced at the trial, if proper diligence had been used. At all events, we are not authorized to reverse the judgment below because the court failed to grant a new trial upon this ground alone, since we do not find that there was any abuse of his discretion in that regard.

We find no error in the record before us and the judgment is affirmed.

LIEN OF ALIMONY TO WIFE.

Circuit Court of Lorain County.

ALBERT M. WEBSTER v. ADA M. MILLER.*

Decided, December 28, 1909.

Alimony—Division of Property.

A money judgment rendered in a divorce and alimony case, payable in installments, made a lien on the husband's property and with express provision for execution, rendered in favor of the wife, though the divorce is granted to the husband, will be sustained as a division of property between the parties under favor of Section 5700, Revised Statutes.

HENRY, J.; WINCH, J.. and MARVIN, J., concur.

Early in the present term of court this cause was heard and it was orally announced from the bench that the plaintiff was entitled to judgment, and an opinion to that effect was handed down. Afterwards two of the judges who participated in that hearing requested a re-argument, because of doubts as to the correctness of the court's decision. The case has therefore been re-argued and we are now confirmed in the belief that the court erred in its former decision.

This is an action to enjoin the collection of a judgment purporting to be for alimony to the defendant here, Ada M. Miller, awarded notwithstanding that by the same decree a divorce was granted to the plaintiff, Albert M. Webster, for his wife's aggression.

In view of the construction placed by the Supreme Court upon Sections 5700 and 5702, Revised Statutes, in the case of *Hassaurek v. Markbreit*, 68 Ohio St., 579, it is plain that no alimony could rightfully have been allowed to the wife under such circumstances.

The sole question here is whether or not this award to the wife, though denominated alimony, may not be upheld as amounting to a division of property under Section 5700. This is the same

*Affirmed without opinion, *Webster v. Miller*, 83 Ohio State, 473.

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question as arose in *Kelso v. Lovejoy*, 29 C. C., 597, affirmed by the Supreme Court in 76 Ohio St., 598. There the award to the wife against whom a divorce was granted by the same decree was denominated alimony, and there also it was payable in installments.

It is claimed here, however, that the case before us is distinguished in that the decree provides for three other things which render it still more inconsistent with the idea that it was intended or may be regarded as an award to the wife of a share in her husband's property, rather than as alimony. These are the three elements:

1. That a money judgment in favor of the wife and against the husband was in terms rendered.
2. That said judgment is in terms made a lien upon the husband's property, and
3. That express provision is made that execution may issue for the collection of said judgment.

But we see no necessary inconsistency between any or all of these elements in the decree and the construction of the entire judgment as the award of a share of the husband's property. If, for example, such property consist of money, what possible objection can be raised to the rendition of a money judgment for such share thereof as the court determines to award to the wife? What good reason can be urged why such a judgment should not possess the usual incidents of money judgments, to-wit, a lien upon the real estate of the judgment debtor, and the right of the judgment creditor to issue execution for the collection of the sum adjudged to be due?

If the case of *Kelso v. Lovejoy et al* was properly decided, as must be conceded, since the Supreme Court has affirmed it, the main objections to the validity of the judgment here assailed are overcome, and the facts in this case afford no sufficient ground for distinguishing it. The petition will therefore be dismissed.

REVIEW OF ADDITION TO TAX RETURN.

Court of Appeals for Hamilton County.

THE STANDARD OIL COMPANY V. HOPKINS, TREASURER.

Decided, April, 1913.

Taxation—Injunction Lies to Set Aside an Arbitrary Addition to a Tax Return—Section 1465-1, et seq.

The allegation that an addition has been made to the plaintiff's tax return, arbitrarily and capriciously and without any evidence or information to warrant so doing, states a good cause of action and is not open to demurrer.

C. W. Baker, for plaintiff in error.

Thos. L. Pogue, Prosecuting Attorney, and *John V. Campbell* and *C. A. Groom*, Assistant Prosecuting Attorneys, contra.

SWING, J.; JONES, E. H., J., and JONES, O. B., J., concur.

This was an action by way of injunction to enjoin the collection of taxes which the plaintiff claims were illegally assessed against it. The gist of the action is set forth in the following allegation: "On the 30th day of September, 1912, the said board of review, arbitrarily and capriciously and without any evidence or information whatsoever to warrant such action, added the sum of \$4,123 to the tax return of plaintiff."

To this petition a demurrer was filed.

The petition states a good cause of action, and injunction is the proper and only remedy (14 C. C., 94; 35 O. S., 474; 55 O. S., 466). The law passed May 11, 1911 (102 O. L., 224), makes no provision by which the tax-payer may have his case reviewed by the state tax commission either by error or appeal, and does not take away from the tax-payer his right by injunction to set aside an illegal act by the board of review.

Demurrer overruled.

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PROSECUTION FOR ILLEGAL SALE OF INTOXICATING LIQUORS.

Court of Appeals for Ashtabula County.

MICHAEL DENIEL V. THE STATE OF OHIO.

Decided, September 11, 1913.

Procedure in Prosecution for Violation of an Ordinance Against Sale of Intoxicating Liquor—Effect of Refusal by the Common Pleas of Leave to File Petition in Error.

Where one who has been tried and convicted before a magistrate for violation of the law against the sale of intoxicating liquors, applies to the court of common pleas for leave to file a petition in error to review the proceedings and judgment of the magistrate, and the court to whom the application is made refuses to grant leave to file a petition in error, such refusal is not reviewable on error in the court of appeals.

Mr. Mygatt, for motion to strike off.

Chadman & Appleby, contra.

NORRIS, J.; POLLOCK, J., and METCALFE, J., concur.

Motion for leave to file petition in error to review the refusal of the court of common pleas to permit a petition in error to be filed in the same case and motion to strike off that motion.

Deniel was convicted before a magistrate of violation of the law against the sale of intoxicating liquors. He made application to the court of common pleas for leave to file a petition in error to review the proceedings and judgment of the magistrate, which leave was refused. Application was made to this court for leave to file a petition in error to review that refusal, and motion made to strike off the motion for leave.

We had supposed that the question of granting leave in such a case was settled by the Supreme Court in the case of *Village of Canfield v. Probst*, 71 O. S., 42, the syllabus of which is as follows:

“Where one who has been tried and convicted before a mayor of a municipal corporation for violation of an ordinance, applied

under Section 1752, Revised Statutes, to the court of common pleas, or a judge thereof, for leave to file a petition in error to review the proceedings and judgment of the mayor, and the court or judge, to whom the application is made refuses to grant leave to file the petition in error, such refusal is not reviewable on error in the circuit court."

Now, it is urged that there is a distinction between this case, which is a prosecution for violation of the liquor law, and a prosecution for violation of the village ordinance, but the Supreme Court does not put the decision in the Canfield case upon any such distinction as is urged by counsel. In this case application was to be made to the court. In the Canfield case it might have been made to the court or a judge thereof, but what may the court review? Section 6707, Revised Statutes, provides:

"An order affecting a substantial right in an action, when such order in effect determines the action and prevents a judgment, and an order affecting a substantial right made in a special proceeding or upon a summary application in an action after judgment, is a final order which may be vacated, modified or reversed as provided in this title."

Now, the Supreme Court in the Canfield case say that there was no action pending, simply an application for leave to file, and it could not be claimed that it was an order made in an action, and they say:

"The application for leave to file a petition in error, can not be dignified by the name of a proceeding, special or otherwise. The term 'special proceeding' is sometimes defined as a proceeding in a court which was not, under the common law and equity practice, either an action at law or a suit in chancery. The term is used in code states in contradistinction to 'action.' The defendant in error sought to institute a proceeding. He could do so only upon leave of the common pleas court or a judge thereof. The asking leave is not a special proceeding and does not become such until the door of the court is opened for its entrance."

Now, it would seem that this reasoning applies with equal force to proceedings under the liquor law, which provides that

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no petition in error can be filed without leave of the court, and when such leave is refused there is nothing for a higher court to review.

See also the case of *Walder v. State of Ohio*, 82 O. S., 452, where the Supreme Court applied the reasoning in the Canfield case to a case for violation of the law prohibiting the sale of intoxicating liquors. There is a further reason that under the new Constitution the jurisdiction of the court of appeals is expressly limited as follows:

“The court of appeals shall have original jurisdiction in quo warranto, mandamus, habeas corpus, prohibition and procedendo, and appellate jurisdiction in the trial of chancery cases, and to review, affirm, modify or reverse the judgments of the court of common pleas.”

As we have already found, there was no judgment of the court of common pleas in this case, so that there was nothing for this court to modify or reverse. The motion to strike off the motion for leave to file a petition in error will be sustained and the motion stricken off.

MISCONDUCT OF COUNSEL; IN ARGUMENT TO THE JURY.

Circuit Court of Cuyahoga County.

THE AMERICAN HARD RUBBER COMPANY V. LOLA PIERCE.

Decided, June 10, 1910.

Master and Servant—Negligence—Nature and Cause of Injuries for Jury—Charge as to Same—As to Assumed Risk—Misconduct of Counsel.

1. In an action for damages resulting from personal injuries received as a result of the defendant's negligence, whether the causal sequence in fact includes all that the petition claims in the way of physical disability from the injury, is a question for the jury.
2. The fact that the results alleged from the cause alleged are unusual and therefore antecedently improbable, is not the true criterion. Neither is it any test that the cause was small and the effect great, nor that the particular result claimed was facilitated by concomitant circumstances. The real question is whether the plaintiff's disabilities are directly traceable to the injury received, or whether they were brought about by the active intervention of a new and distinct cause such as some injurious act or conduct of the plaintiff.
3. Unless the distinction is pointed out between the kindred doctrines of employee's risk, as applied to the ordinary hazards incident to the employment, on the one hand, and on the other hand to the defects and dangers which are not naturally incident to the employment but of which the employee has notice, it is misleading to charge that "injuries that result from the negligence of the master are not assumed," or that the rule of assumed risk "presupposes that the master has exercised due care, in providing a reasonably safe and proper place to work, and reasonably safe machinery for the performance of the required services."
4. It is misconduct of counsel, for which a judgment will be reversed, to say to the jury: "And the first thing this defendant did when this suit was brought was to compel this poor girl to give security for costs. This girl worked at this shop at a dollar a day. No wonder men become millionaires when they employ girls at such niggardly wages. You should give something as a wholesome example to this defendant in this case. Let your verdict be so large that it will be a lesson and punishment to this defendant to obey the law."

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Arthur Van Epp, W. H. Anderson, J. A. Kohler, C. E. Smoyer and Thompson, Glitsch & Cinniger, for plaintiff in error.

Musser, Kimber & Huffman, contra.

HENRY, J.; WINCH, J.. and MARVIN, J., concur.

This proceeding in error was brought to reverse a judgment recovered by the defendant in error for damages for personal injuries sustained by her September 7th, 1906, while in the employ of the plaintiff in error, a manufacturer of hard rubber products such as penholders, telephone receivers, etc.

The defendant in error at the time of her injury was a young woman twenty years old. She entered this company's employ about August 9, 1906, and between that date and the time of her injury she worked in the building room, in all about three weeks. She had previously had some factory experience in two other establishments, but not at the same kind of work. Here she was engaged with many other female employees, in polishing the small hard rubber objects which this company manufactured. This was accomplished by pressing the object to be polished against the cloth covering of a rapidly revolving buffing wheel. There were in the buffing room a number of such wheels, arranged in rows about fourteen or sixteen feet apart, each wheel having an operator. To facilitate the work of polishing each operator was supplied with a lump of polishing compound, known as a grease-ball, which was applied from time to time to the revolving wheel by pressing the same against it.

Lola Pierce was one of these operators. Birdie Springston was another. At the time of the accident they were situated diagonally across the room from one another, and working at their respective wheels in different rows. While Miss Springston was applying her grease ball to her wheel, it slipped from her grasp, and being forcibly thrown by the revolving wheel across the room, struck Miss Pierce in or over her left eye. The blow was not such as to leave any permanent external marks, but it was followed by a nervous condition which renders her apparently a physical wreck.

Her petition below alleged that the company was aware that the wheels not infrequently threw objects across the room in this manner, but that she was without means of knowing and did not know that such was the fact. The negligence alleged is that the company failed to provide screens or other means to intercept such flying objects. The company insists, however, that its buffing room was equipped in the customary and most approved manner in every respect, with suction blowers to carry away the dust and without any concealed danger in or about the machines; that Miss Pierce had previously worked at the wheel which threw the grease-ball, and in short that she had full knowledge of the situation and of the conditions attending and surrounding her at the time she was injured.

The errors assigned here are:

First. That the assumption by the plaintiff below of the risk from the negligence alleged by her is manifest both from her petition and from the facts proved; this question being saved by demurrer to the petition, and by motions to direct a verdict, and, after verdict, for a new trial, all of which were overruled and exceptions reserved.

It is true that the absence of any screen which would intercept objects flying across the room was manifest to the plaintiff below, but it is by no means clear that the danger against which a screen would have protected her was apparent to an employee with such experience and understanding as she had. In *Pennsylvania Company v. McCurdy*, 66 Ohio St., 118. it was held that:

“An employee experienced in the service in which he is engaged is conclusively held to appreciate the dangers which may arise from defects of which he has, or in the exercise of due care, might have knowledge.”

It can hardly be said, however, that the plaintiff below was experienced in this service wherein her entire period of employment was not more than three or four weeks. The cause of her injury was not of the sort that to be appreciated needs but to be seen, but was rather of the nature of a latent danger discoverable only by reason of experience, in addition to mere observation. To the latter class belongs the case of *The Lake Shore & Michi-*

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gan Southern Railway Co. v. Fitzpatrick, 31 Ohio St., 479, wherein:

“The plaintiff was employed by the defendant to operate a turntable by means of a crank that was stationary upon and revolved with the turntable and a track was laid in such proximity to the turntable that while an engine was on the turntable being turned by the plaintiff it was struck by an engine passing upon the track, causing the crank to strike the plaintiff by a reverse motion, inflicting the injury complained of.”

In that case all the facts which contributed to the ultimate result were within the range of Fitzpatrick's observation but it would have required reflection to bring home to his mind the possibility of his being injured under those circumstances. So here, anyone who once observed an object thrown across the buffing room by any of the wheels at which the operators worked, would of course realize that the occurrence might be repeated, but until it had once occurred in fact, it would be quite unlikely to occur to the mind of an employee having but little experience.

There is some evidence in this case that the foreman had been present on some former occasion when an object was thrown across the room thus, but whether so or not, notice of the likelihood of such an occurrence may fairly be ascribed to the employer who had installed the machinery and provided the power by which it was operated, and who exercised the duty of oversight of the business. There is no evidence to show that the plaintiff below had any actual knowledge of any prior occurrence of this sort, and as already intimated constructive notice can not, merely as a matter of law, be ascribed to her. The doctrine of *Coal & Car Co. v. Norman*, 49th Ohio St., 598, was properly charged to the jury and this sufficed to cover the subject.

The second assignment of error is that the verdict of twelve thousand dollars is excessive and was apparently given under the influence of passion and prejudice, so as to include compensation for a disability which, so far as it is real and not merely apparent, is neither the direct consequence of the blow received by the plaintiff below, nor was it reasonable to be anticipated as likely to result from the alleged negligence of the defendant below. The cause, extent and reality of plaintiff's physical dis-

ability were, as the bill of exceptions discloses, sharply contested upon the trial. There are indeed disclosures in the record, to some of which we shall again advert, that suggest an overestimate by the jury of the actual damage sustained by the plaintiff below, as a direct consequence of the alleged negligent injury, but we fail to find enough in the record to warrant us in saying, as a matter of law, that the jury were biased, or that the verdict is excessive. On the contrary, it is apparent that if she was not malingering, and if her condition at the time of the trial was not due to some other and different cause than the one she alleges, the amount of the verdict will afford her but imperfect compensation for aggravated and lifelong invalidism.

Whether the causal sequence in fact includes all that the petition claims in the way of physical disability from the blow which the defendant in error received, was, of course, a question for the jury. The fact that such results from such a cause are unusual, and therefore antecedently improbable, is not the true criterion. Neither is it any test that the cause was small and the effect great; nor that this particular result was facilitated by concomitant circumstances. The real question is whether the defendant in error's disabilities are directly traceable and attributable to the blow, or whether they were brought about by the active intervention of a new and distinct cause, such as some injurious act or conduct of her own.

The third error assigned is upon the admission of evidence as to the existence of screens in other factories at the present time, and as to the former maintenance of such screens in this factory, all of which is claimed to be prejudicial because of the fact that the jury in this case had viewed the premises and seen the buffing room equipped in like manner after the accident. This situation, if we correctly apprehend it, is not fully disclosed by the bill of exceptions, and after examination of the pages referred to in argument and in the brief of counsel, we find no prejudicial error, although it would apparently have been better under the circumstances if the jury had not been permitted to view the premises at all.

As to the existence of screens in other factories the witness Dangel was asked but replied that he did not know; and as to

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the present screens in the Akron factory the witness, though asked, did not answer, and the question was not pressed. We find no error in this regard.

The fourth assignment of error is upon the refusal of requests to charge presented by the defendant below, particularly the second request; and the giving of the third and sixth requests presented by the plaintiff below.

Defendant's second request sought to limit its liability to \$3,000 pursuant to the provisions of Section (4238-01), Revised Statutes, which provides that:

"In any action brought by an employee, or his legal representative, against his employer, to recover for personal injuries, when it shall appear that the injury was caused in whole or in part by the negligent omission of such employer to guard or protect his machinery or appliances, or the premises or place where said employee was employed, in the manner required by any penal statute of the state or United States in force at the date of the passage of the act, the fact that such employee continued in said employment with knowledge of such omission, shall not operate as a defense; and in such action, if the jury find for the plaintiff, it may award such damages not exceeding, for injuries resulting in death, the sum of five thousand dollars and for injuries not so resulting, the sum of three thousand dollars, as it may find proportioned to the pecuniary damages resulting from said injuries."

This section is claimed to be applicable because plaintiff's cause of action arises under Revised Statutes (4364-86) which provides:

"That all persons, companies or corporations operating any factory or workshop, where emery wheels or emery belts of any description are used, either solid emery, leather, leather covered, felt, canvas, linen, paper, cotton or wheels or belts rolled or coated with emery or corundum, or cotton wheels used as buffs, shall provide the same with blowers, or similar apparatus, which shall be placed over, besides or under such wheels or belts, in such a manner as to protect the person or persons using the same from the particles of dust produced and caused thereby, and to carry away the dust arising from or thrown off by such wheels or belts while in operation, directly to the outside of the building, or to some receptacle place, so as to receive and confine such dust."

Some confusion appears to have been interjected, intentionally or otherwise, into the trial of this case in regard to the presence and function of blowers. As we view the record, the presence or absence of blowers is utterly immaterial. Their function is to dispose of dust, etc., so that the operator's health shall not be injured by inhaling the same, etc. It can not be assumed that they have any function whatever in respect to intercepting objects that are thrown by the wheels across the room in which the work is being done. There is, therefore, no ground for invoking these statutes. In the final state of the pleadings these statutory provisions are not invoked by the plaintiff, and the defendant was clearly not entitled to invoke the limitation of liability therein prescribed.

Not less plainly unwarranted are the two requests, Nos. 3 and 6, which were presented by the plaintiff below, given by the court, and excepted to by the defendant. They are both misleading. Without quoting them at length it suffices to say that they confuse the kindred but distinct doctrines of employee's risk, as applied to the ordinary hazards incident to the employment, on the one hand, and on the other hand, to the defects and dangers which are not naturally incident to the employment but of which the employee has notice. Unless this distinction is observed and allowance therefor properly made, it is misleading to say that "injuries that result from the negligence of the master are not assumed," or that the rule of assumed risk "presupposes that the master has exercised due care, as above defined, in providing a reasonably safe and proper place to work, and reasonably safe machinery for the performance of the required services."

The language thus employed, and indeed we believe the entire context of both these requests is taken from opinions of the Supreme Court; but it is to be remembered that since the reporter's note of August, 1857, prefacing the 6th Volume of the Ohio State Reports, the syllabus and not the opinion of the judge who announced the decision of the court in any case is to be taken as the authoritative expression of the precise point of law therein adjudicated. Moreover, it will not do to take language out of an opinion of a court which is entirely correct so

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long as it is understood as applying peculiarly to the facts of the case then in hand and charge the same in another case involving a different state of facts as a correct statement of law applicable thereto.

It follows from what has been said that these requests should not have been given because they were misleading and inaccurate as applied to the facts in this case.

The fifth assignment of error is upon the refusal of the motion for a new trial, because of newly-discovered evidence. We do not think, however, that such diligence was shown in respect to procuring the evidence in question at the time of the trial of the cause as to warrant the granting of a new trial for that reason. Nor is the excuse that counsel for the defendant below expected the plaintiff to produce the witnesses from whom this testimony might have been derived at all adequate. The defendant had opportunity to present evidence afterwards, but failed to take advantage of it. The fact that they had not time to communicate with the witnesses and find out whether their testimony would be favorable or unfavorable, if it be a fact, is of no moment.

The sixth and last assignment of error is upon the refusal to grant a new trial for alleged misconduct of counsel below in argument to the jury. We think there was decided misconduct in the use of the following language in the argument of counsel for plaintiff below to the jury.

“And the first thing this defendant did when this suit was brought was to compel this poor girl to give security for costs. This girl worked at this shop at a dollar a day. No wonder men become millionaires when they employ girls at such niggardly wages. You should give something as a wholesome example to this defendant in this case. Let your verdict be so large that it will be a lesson and punishment to this defendant to obey the law.”

It is true that the court subsequently instructed the jury as follows:

“In your deliberations you should entirely disregard what counsel for plaintiff said about a motion having been filed in this case to compel plaintiff to give security for costs, and not allow

the same, even if the same were true, to influence your verdict in any particular. That is a right which resident defendants have to be indemnified against the liability for costs which a non-resident plaintiff would make in the prosecution of an action in court."

In *The Toledo, St. Louis & Western Railroad Company v. Burr & Jeakle et al*, decided by the Supreme Court of Ohio, April 12, 1910, the court says of a statement no more prejudicial than that above quoted from the argument of counsel for plaintiff below:

"That the statements thus made by counsel transcended the bounds of legitimate argument and were grossly improper, is both obvious and conceded, but it is claimed that any prejudicial effect which such statements may have had was removed or cured by the subsequent action of court and counsel. This conclusion we think, by no means follows, nor does it affirmatively appear in this case that such conclusion is justified by the facts. While it is true that courts of last resort have frequently, though not uniformly, held the rule to be, that the prejudice, if any, resulting from the misconduct of counsel in argument to the jury may be eliminated or cured by the prompt withdrawal of the objectionable statements made by counsel accompanied by an instruction from the court to the jury to disregard such statements, yet this rule, so far as our examination of the authorities has disclosed, is recognized and applied by the courts in those cases only, where it is made to appear by the record from a consideration of the character of the statements made, that their prejudicial effect has probably been averted by such withdrawal and instruction."

Continuing the opinion, the learned judge points out. "the question of defendant's negligence and consequent liability was at best a very close question of fact, involved in much uncertainty and doubt." And that:

"The attempted withdrawal of these statements from the jury was wholly impotent to rid them of the mischievous inference that they were nevertheless true, and was utterly ineffectual to dislodge or remove from the minds of the jurors the harmful impression, which such statements were calculated, and obviously intended to produce. No other rational conclusion can be reached in this case than that plaintiff's counsel by the making of such statements intended thereby and in that way to

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get before the jury a fact which he was not entitled to, and one which from considerations of public policy the law forbade should be mentioned on the trial, and this for the sole and obvious purpose of inducing in the minds of the jury the impression or belief, that the railroad company in making such offer had, indirectly at least, confessed and admitted its liability. Manifestly this was the purpose of counsel's statements, and we think it impossible to say in this case that such was not their effect. While it should perhaps be said, that after objection made, court and counsel did all in their power to counteract and overcome the effect of these improper and prejudicial statements, yet, the mischief had been done. the poison had been injected, and that which thereafter occurred was not, in our judgment, a sufficient antidote. It is the policy of the law to encourage the settlement of legal controversies, and hence it does not permit an offer of compromise to be given in evidence as an acknowledgment or admission of the party making it. and this salutary rule, which is grounded upon consideration of public policy, just as imperatively forbids that the fact that such offer was made shall be mentioned or commented upon by counsel in argument to the jury, and when it is, unless it shall clearly appear from the record in the particular case that the verdict of the jury was not affected thereby, the misconduct is such as to require in the due administration of justice, that a new trial be granted therefor. The view that misconduct of counsel such as is complained of in this case is sufficient to warrant and require the granting of a new trial unless it be made to appear that the verdict of the jury was not in any manner influenced thereby, is fully supported by the several cases cited in the brief of counsel for plaintiff in error, and by many others."

For the reasons thus expressed, we think the court below erred in the case at bar in refusing to grant a new trial for misconduct of counsel.

For error, therefore, in charging the jury in accordance with requests Nos. 3 and 6 by the plaintiff below, and in refusing a motion for a new trial, because of misconduct of counsel for the prevailing party, the judgment is reversed and the cause remanded for a new trial.

FIXING THE GRADE OF A DEDICATED STREET.

Circuit Court of Lorain County.

THE ELY REALTY CO. v. CITY OF ELYRIA.*

Decided, September 28, 1910.

Municipal Corporations—Dedication of Street—Establishing Grade—Damages.

Where land is dedicated for a street, the dedication carries with it the right to improve to a reasonable grade.

E. G., H. C. and T. C. Johnson, for plaintiff in error.

H. A. Pounds, contra.

HENRY, J.; WINCH, J.. and MARVIN, J., concur.

The parties stand here as they stood below. There the action was one to recover damages occasioned by the placing of the abutment of a high level bridge across Black river in the highway in front of plaintiff's land in the city of Elyria. The highway was originally dedicated to the river's edge by Herman Ely, the founder of the city, and a predecessor of the plaintiff in the ownership of said land. The petition, though intimating that the dedication was never accepted, nevertheless alleges that the location of the bridge abutment is a public highway. The city, it may be fairly inferred from the petition, had, by proper proceedings taken shortly before constructing the bridge, caused the highway to be extended in contemplation of law across the river to a corresponding highway on the opposite bank. Then it proceeded to effect what amounts to a very considerable change in the actual grade, by building said high level bridge. The abutments constitute a substantial impediment to ingress and egress to and from plaintiff's land. No previous legal grade had, however, been established, and plaintiff's land is unimproved.

Under these circumstances we are unable to distinguish the case from the long line of authorities which establish that a rea-

*Affirmed without opinion, *Ely Realty Co. v. Elyria*, 86 Ohio State, 328.

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sonable grade when first fixed by the public authorities, however much it may alter the actually existing surface of a highway, affords no ground for the recovery of damages by abutting lot owners. Their plight is expressed in the maxim *damnum absque injuria*. Where land is dedicated for a street the dedication carries with it the right to improve the street to a reasonable grade.

The facts of *Cohen v. Cleveland*, 43 Ohio St., 190, are admittedly such as to distinguish it from the case at bar. It will be remembered that the facts of that case are these (I read from the syllabus):

“Under the acts of 1872 and 1876 (69 O. L., 138, 73 Ohio Laws. 107), a viaduct sixty-four feet wide, with a level roadway was constructed in Cleveland across the Cuyahoga river. On the south side of Superior street, between Water street and the river, a distance of 768 feet, the city condemned a strip of ground, and the viaduct was constructed over that strip and over part of Superior street, about thirty-seven feet being over the strip opposite Cohen’s premises, and the balance over the street, so that in effect Superior street, which was ninety-three feet wide, is reduced in width between Water street and the river, and opposite Cohen’s premises its present width is sixty-six feet. The elevation of the roadway of the viaduct above Superior street gradually increases from Water street to the river, and opposite the premises of Cohen which are on the north side of Superior street, midway between Water street and the river, the elevation is forty-five feet and it is alleged that the viaduct diverts travel from that part of Superior street, impairs the light and air to Cohen’s premises, causes noise and the jarring of his house day and night, and has impaired the value of his property and reduced its rental value. *Held*:

“1. The viaduct is a lawful structure.

“2. On proof of the alleged injury, Cohen is entitled to damages.

“3. Cohen is not owner of a lot ‘bounding or abutting upon the proposed improvement.’ within the meaning of the municipal code, Section 564, and hence it was not necessary for him to file a claim for damages under that section.”

We do not consider that that decision is applicable to the facts of the case before us, and while the facts here undoubtedly present some elements that have not been present in any cases

of the sort referred to in the long line of decisions of the Supreme Court of this state, yet we think that the facts are to be assimilated to the change of grade cases where no grade had previously been established, and the demurrer to the petition below was properly sustained, and the judgment is affirmed.

BREACH OF ADVERTISING CONTRACT.

Circuit Court of Lorain County.

A. A. HARTZELL v. H. A. OEHLKE.

Decided, September 28, 1910.

Contract—Termination of, by Defendant—Action on Contract for Part Performed and on Breach of Contract for Balance.

In an action on a contract for publication of advertising matter, when it appears that the defendant notified the publisher to discontinue the publication, the publisher is entitled to recover for advertising published up to the date of the notice and damages for breach of the balance of the contract; he can not disregard the notice, continue the publication and thereafter recover full compensation as provided in the contract.

Webber & Metcalf, for plaintiff in error.

G. A. Resek and Van Deusen & Calhoun, contra.

HENRY, J ; WINCH, J., and MARVIN, J., concur.

The parties to this proceeding in error stand related here as they stood below. The plaintiff there recovered a judgment (which he deems to be inadequate in amount), in his action for the entire compensation provided for by the terms of a written contract which his petition alleges to have been fully performed on his part. The agreement between the parties is styled "Advertising Contract" and is dated "Lorain, O., Aug. 26, 1908." It provides in substance that Hartzell was to publish in the programs of the Majestic Theater in that city at every performance during the season of 1908-9 such advertising copy to occupy two spaces of $2\frac{1}{2}$ by $5\frac{1}{4}$ inches each at top of page as the defendant

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Oehlke, a merchant of Lorain, should supply from week to week for that purpose, to be paid for at the price of one dollar for each performance, payable weekly.

Upon the trial it appeared that Oehlke had notified the plaintiff that he would not be bound by the agreement any longer and requested that the publication of his advertisement be discontinued. Hartzelt ignored this notice and request, continued the publication throughout the season, and sued for the whole amount stipulated in the contract, on the theory, apparently, that the agreement remained in full force, unaffected by the renunciation, and that it had been completely executed by him. The answer set up the repudiation of the contract and alleged that it had been procured by fraud and false representations. The verdict eliminated the issue of fraud by affirming the validity of the contract, under proper instructions of the court in that behalf; but, under the charge of the court, the verdict could and did embrace only the amount of the earned installments of compensation which accrued before the contract was repudiated. The court thus instructed the jury:

“Ordinarily, in a proper action for breach of contract the plaintiff would be entitled to recover the damage which the evidence showed he suffered as the natural and necessary consequence of the breach of said contract by the defendant which he admits he committed when he served notice on the plaintiff thirty days after the contract was signed, but if such was this action, even if the contract was valid, the defendant had a right to stop its further performance by the plaintiff, being liable in damages in a proper action for so doing; but after the defendant repudiated the contract and ordered the plaintiff to discontinue its performance, the plaintiff could not add to his damages by disregarding the repudiation and continuing performance.

“But this is not such an action. This is an action on the contract, and if the contract was a valid contract the plaintiff can, if he chooses, sue for and recover pay at the contract price for so much as was due under the contract at the time of repudiation, and in this action that is all he can recover. The fact that it cost the plaintiff to continue the publication after repudiation of the contract by the defendant or that defendant might have derived some benefit from the continued publication, has nothing to do with the amount which plaintiff is entitled to recover in this action, and there being no evidence of damage for breach of con-

tract in this case, if you find that the contract is valid, not void for fraud, you will return a verdict for the plaintiff for the amount which was due at the contract price for the publication at the time of the repudiation, together with interest thereon from the time of the repudiation to the first day of this term of court, which was April 4, 1910."

This charge accords with the doctrine laid down in *3 Page on Contracts*, Section 1435 *et seq.* A similar case is *Waid et al v. American Health Food Co.* (Wis., 1903), 96 N. W., 388, the last three paragraphs of the syllabus of which are as follows:

"Defendants contracted with plaintiffs to place their advertising cards in certain railway cars in a manner provided from June 19, 1900, up to and including July 10, 1901. The contract also provided that 'non-use of space from advertiser's act or omission was the advertiser's loss.' *Held*: That the contract did not constitute a sublease of space which had been let by the owners of the cars to plaintiffs, but was a contract for plaintiffs' personal services, and was, therefore, executory until the date provided by the contract for its termination.

"Where defendants contracted with plaintiffs for certain advertising to be placed in railroad cars for a period of twelve months, the contract being executory before termination of the contract period, defendants were entitled to stop further performance on plaintiffs' part and limit their further liability for remaining period to damages sustained from breach of the contract.

"Defendants contracted with plaintiffs for certain advertising to be placed by plaintiffs in certain railroad cars for a period of twelve months. On the expiration of two months and seventeen days defendants directed plaintiffs to remove the cards, which they failed to do, and after the expiration of the twelve months brought suit to recover the contract price, alleging full performance. *Held*: That defendant's notification constituted a breach of the contract, and hence, under the complaint, plaintiffs were only entitled to recover the contract price for the two months and seventeen days during which the contract was performed prior to the breach."

I am not sure that this syllabus is the syllabus prepared by the court for the official reports, but it is sufficiently well prepared to reflect the view which the court take of the case, the facts of which are strikingly like those in the case at bar.

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An advertising contract of this sort being thus deemed to be a contract for personal services the rule in this jurisdiction may be found in *James v. Allen County*, 44 Ohio State, 226, where Spear, J., at page 237 says:

“As a result from the authorities, as well as upon principle we are satisfied that in such a contract as the one in the case at bar, where the employee is wrongfully dismissed, but all wages actually earned up to that time are paid, the only action the employee has, whether he bring it at once or wait until the entire period of hire has expired, is one for damages for the breach of the contract, and the measure of damages will be the loss or injury occasioned by that breach.”

Some of the reasoning of the court in the opinion in the case of *James v. Allen County*, is not applicable to the facts before us now, and with respect to the line of reasoning here indulged it may be asserted, and it has occurred to our minds, that there is a difficulty arising from the fact that Hartzell in this case continued to perform the contract, or to perform the things contemplated by the contract as originally made, throughout the full contract period and then sued alleging full performance and praying for the contract price or pay for his services so rendered.

The answer to the suggestion of difficulty arising from that plain statement of facts of the case is to be found, we think, in this: that from the moment of the renunciation of the contract, wrongful though it be, the relationship of employer and employee, the status of employment, is terminated and thenceforward the things done in attempted fulfillment of the contract are not done in pursuance of the relationship which the contract creates, that relationship having been terminated by the repudiation of the contract. So that no action for wages or compensation, or pay, for the period elapsing after the contract is so repudiated can be maintained, and the only action, as Judge Spear says, that can be maintained under such a state of facts is an action for damages for breach of contract. There is no hint or suggestion in the petition in this case that such was the theory of the pleader when he prepared the petition that was filed in the court below. His theory was simply that the contract remained in full

force and effect and that he had fully performed it, and he was entitled to the pay which was provided for.

The trial court, we think, correctly charged the jury and we find no error in the charge nor elsewhere in the record, and the judgment below is affirmed.

**PROSECUTION FOR ABSTRACTION OF STOCK OF A FREE
BANKING CORPORATION.**

Circuit Court of Stark County.

WILLIAM L. DAVIS v. STATE OF OHIO.

Decided, July 21, 1910.

*Abstracting Property of Bank—Free Banks—Certificates of Shares
Therein.*

An officer of a state bank, incorporated under the free banking act, who withdraws from its custody certain certificates of partially paid up shares of its capital stock, owned by him and by him hypothecated to it as additional security for an antecedent debt due from him to said bank, can not be convicted under Section 3821-85, Revised Statutes, of abstracting property of said bank.

HENRY, J.; MARVIN, J., and METCALFE, J., concur.

The plaintiff in error, an officer and director in the Canton State Bank, incorporated under the free banking act, was convicted of abstracting from it certain certificates of partially paid-up shares of its capital stock, owned by him and by him hypothecated as additional security for an antecedent debt due from him to said bank, the same being in alleged violation of Revised Statutes, Section (3821-85), which reads as follows:

“Every president, director, cashier, teller, clerk or agent of any banking company, who shall embezzle, abstract or willfully misapply any of the moneys, funds, or credits of such company, or shall, without authority from the directors, issue or put forth any certificate of deposit, draw any order or bill of exchange, make any acceptance, assign any notes, bonds, drafts, or bills of exchange, mortgage, judgment or decree, or shall make any

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false entry in any bank book, report or statement of the company, with intent in either case to injure or defraud the company, or any other company, body politic or corporate, or any individual person, or to deceive any officer of the company, or any agent appointed to inspect the affairs of any banking company in this state, shall be guilty of an offense, and, upon conviction thereof, shall be confined in the penitentiary at hard labor, not less than one year, nor more than ten years.”

Among the errors assigned is the fundamental one that the first count of the indictment, being the one on which the conviction was had, states no offense. This count charges that:

“William L. Davis and Corwin D. Bachtel late of said county, on or about the 13th day of December, in the year of our Lord one thousand nine hundred and four, at the county of Stark aforesaid, said William L. Davis being then and there an officer, to-wit, vice-president and a director of the Canton State Bank, a corporation, incorporated and organized as a banking company under the law of the state of Ohio, known as the free banking act passed 1851, by the Legislature of Ohio, and which banking company, on or about the 25th day of December, 1904, and at the time of the abstraction of the personal property of said banking company, to-wit, the certificates of stocks as hereinafter described, was doing a banking business in the city of Canton, Stark county, Ohio, as a free banking company, and said Corwin D. Bachtel being then and there and at the time an officer, to-wit, the cashier and director of the Canton State Banking Company, certain property, to-wit, certain certificates for 350 shares of the capital stock of said banking company, to-wit, certificate No. 20 for 100 shares, certificate No. 181 for 100 shares, certificate No. 223 for 100 shares, certificate No. 244 for 40 shares and certificate No. 256 for 10 shares, which said certificates of stock had theretofore been issued by the said Canton State Bank to the said William L. Davis, and which said certificates of stock had theretofore been hypothecated by the said William L. Davis with the said Canton State Bank, as security for moneys theretofore received by the said William L. Davis from the said, the Canton State Bank, and which said certificates were of the face value of fifty (\$50) dollars per share, and upon which had been paid thereon the sum of thirty (\$30) dollars per share, and which said certificates were then and there of the value of one hundred and five thousand (\$105,000) dollars, of the personal property of and belonging to the said the Canton State Bank. They, the said William L. Davis and Corwin D. Bachtel, officers of the said

the Canton State Bank, as aforesaid, did, at the time and date aforesaid and at the county aforesaid, with the intent on their part to injure and defraud the said the Canton State Bank, unlawfully and fraudulently abstract from the possession of the said the Canton State Bank said certificates of stock heretofore described without the authority of any of the other officers and directors of the said the Canton State Bank, and thereby did defraud and injure the said the Canton State Bank.”

The alleged insufficiency of this indictment is predicated upon the provisions of Sections 11 and 12 of the Free Banking Act, Revised Statutes, Sections (3821-70) and (3821-71) as follows:

“Sec. 11. The capital stock of every company shall be divided into shares of fifty dollars each, which shall be deemed personal property, and shall only be assignable on the books of the company, in such a manner as its by-laws shall prescribe; each bank shall have a lien upon all stock owned by its debtors, and no stock shall be transferred without the consent of a majority of the directors, while the holder thereof is indebted to the company.

“Sec. 12. No company shall take, as security for any loan or discount, a lien upon any part of its capital stock; but the same security, both in kind and amount, shall be required of shareholders as of persons not shareholders; and no banking company shall be the holder or purchaser of any portion of its capital stock, or of the capital stock of any other incorporated company, unless such purchase shall be necessary to prevent loss upon a debt previously contracted in good faith, on security which, at the time, was deemed adequate to insure the payment of such debt, independent of any lien upon such stock; and stock so purchased shall in no case be held by the company so purchasing, for a longer period of time than six months, if the same can be sold for what the stock cost, at par.”

It will be noticed that these statutes give to a free banking corporation a lien upon all stock owned by its debtors, and provide that “no stock shall be transferred without the consent of a majority of the directors while the holder thereof is indebted to the company.” They further provide that “no company shall take, as security for any loan or discount, a lien upon any part of its capital stock,” and “that no banking company shall be the holder or purchaser of any portion of its capital stock * . * unless such purchase shall be necessary to prevent loss upon a debt previously contracted,” etc. The certificates of stock in

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the case before us were not transferred upon the books of the company from the name of the plaintiff in error to that of the defendant in error, so as to make the bank "the holder or purchaser of any portion of its capital stock" represented by such certificates. The only possible property interest, which could have been contemplated by this transaction as passing from Davis to the bank, in and to the certificates in question or the portion of the bank's capital stock which they represented, was that of a pledge, or the lien created by a deposit of certificates of stock as collateral security for a debt owing by the bailor to the bailee. But the object thus contemplated is specifically prohibited by the statutory provision already quoted, that "no company shall take as security for any loan or discount a lien upon any part of its capital stock." This prohibition is, if possible, made more specific by the circumstance that the statute provides that such "bank shall have a lien upon all stock owned by its debtors," and this without the necessity of any deposit, contract or other transaction whatsoever; and by the further circumstances that the statute expressly allows the outright purchase by the bank of its stock owned by its debtor when "necessary to prevent loss upon a debt previously contracted in good faith," etc. The property rights in its own stock which a free banking corporation may not have, and those also which it may or does have, are alike defined and limited by express provisions of law, and such enumeration is necessarily exclusive.

It follows that the deposit by Davis of his certificates of stock with the bank, and the acceptance of such deposit by the bank, for the purpose of creating a lien thereon or upon the stock represented thereby, was *ultra vires* and in contravention of an explicit provision of the statute by which the bank was created and under which alone it could lawfully do business. The transaction was vain and nugatory. It could accomplish nothing beneficial to the bank, for the bank had its statutory lien; and if a pledgee's lien be supposed to be in any respect superior to or different from the statute lien, the bank could derive nothing therefrom, because such superiority, or difference, if any, transcended the express limitations upon the bank's authority to have or enjoy a lien upon its own stock.

In this posture the transaction between the parties rested at the time the alleged offense was committed.

The bank, having gained no advantage by the transaction could suffer no detriment by its undoing. Davis had lost no rights in the certificates of stock and could work no wrong upon the bank by repossessing himself thereof. It was the continuing duty of the parties to undo the illegal thing which they had done in the making and accepting of such deposit. If Davis had at any time demanded of the directors a return of his certificates, they would have had but one lawful course open to them, to-wit, to comply with such demand. Davis, as an officer and director of the bank, having access to the certificates, which were all the time his own property, could, without trespass, taken them into his own possession, either with or without demand made or permission had. His doing so was not an offense. He did not "embezzle, abstract or willfully misapply any of the moneys, funds or credits of such company" by taking his own certificates, which he had the immediate, continuing and absolute right to possess. He could not and did not take the entire property nor indeed any property beyond what he all the while had in the stock represented by those certificates; nor did he deprive the bank of the statutory lien which it had and retained therein.

There may be and doubtless are cases in which certificates of stock, as the evidence of ownership of some portion of the capital stock of a corporation and the muniments of title which pass from hand to hand by way of symbolical delivery of possession of the intangible property which they represent, may be considered as the stock itself. But it must not be forgotten that, as clearly set forth by Crew, J., in *Ball & The American Exchange Bank et al v. The Towle Mfg. Co.*, 67 Ohio St., 306, 314, it is an

"Erroneous assumption and mistaken notion that the stock itself follows the certificate, and that possession of the certificate is possession of the stock. There is a marked and obvious distinction between the *stock* of a corporation and the certificate representing such stock. The certificate of shares of stock in a corporation is not the stock itself, but is a mere evidence of the stockholder's interest itself, in the corporate property of the corporation which issues said certificate (*Cook on Stocks and Stock-*

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holders, Section 485). In the absence of statutory or charter requirement no certificate of stock is necessary to attest the rights of the shareholder in the corporation, and such certificate when issued to the owner of shares of stock is merely an evidence or acknowledgment of the owner's interest in the property of the corporation, but is not the property itself. In law a corporation is the trustee of the corporate property and holds the same for the benefit of the stockholders, and so long as such corporation continues to have a legal existence and to carry on the business for which it was created, it alone is the proper custodian, and has possession of the corporate property. In *Cook on Stocks and Stockholders*, Section 480, the author says:

“ ‘It has been held that if a stockholder whose stock has already been attached or sold on execution sells his certificate of stock after the levy of such attachment or execution, the vendee or transferee buys subject to such levy, even though he had no knowledge of it. The stock in contemplation of law has already been seized by the levy, and the purchaser is bound to take notice of that fact. The only means of avoiding this danger in the purchase of stock is by an inquiry at the office of the corporation at the time of making the purchase.’ ”

The circumstances of this case are such as to make this distinction both germane and necessary.

From what has been said it follows that all the proceedings in the trial upon the first count of the indictment were erroneous. and that the judgment of conviction is contrary to law.

Reversed.

PARTITION OF PERSONAL PROPERTY.

Circuit Court of Harrison County.

JOHN C. MARTIN V. WILLIAM M. EATON.*

Decided, 1912.

Partition—Right of, Where Personal Property is Owned Jointly Not Dependent Upon a Statutory Provision.

Where one of two or more joint owners of personal property which is susceptible of division has taken possession of such property and refuses to make a division thereof, an action in partition may be maintained in equity by one of the joint owners, and the share of each set off to him in severalty, if such share is ascertainable.

METCALFE, J.; FILLIUS, J., concurs.

This case comes before us on demurrer to the second amended petition. This pleading avers, in substance, that the plaintiff and defendant are the joint owners of one hundred and twenty-two bushels of wheat, and that each is entitled to an undivided half interest therein, that the defendant has taken possession of the wheat and refuses to make a division thereof, claiming that he is entitled to more than one-half; and that it is the plaintiff's desire to have his share of the wheat set off to him in severalty, and he prays that partition be made of the joint property.

A demurrer is filed to this petition on the ground that the facts stated do not constitute a cause of action, and it is argued that under the law of Ohio no partition can be made of personal property, and that is the only question we have to decide on this demurrer.

It is true there is no statute authorizing this proceeding, at least our attention has been called to none, and so far we have been unable to find one. But in the absence of such statute does it necessarily follow that such an action can not be maintained?

*NOTE.—Upon the trial of this case on the merits, at a subsequent term before Norris, Pollock and Metcalfe, JJ., the same conclusion was reached as to the right to partition as announced in the above opinion, and partition of the property was ordered.

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It is the province of equity to deal with the rights of parties upon principles of natural justice, and when the right ought to be enforced, is clearly just and contravenes no statute or principle of law, surely the absence of a statute specifically defining such right, or establishing some particular method of procedure in obtaining it, or the want of a precedent, should not prevent the court from doing what seems to be equal and exact justice between the parties. When two parties own personal property in common, and it is easily susceptible of division, and the share of each is ascertainable, what more appropriate method can be conceived of disposing of a controversy about it than to divide it between them, and what sound principle can be urged against it? On principle we think the right to partition is clear, and we are not entirely without light from the authorities. 21 A. & Eng. Encl. of L., 1160; *Weeks v. Weeks*, 5 Iredell Eq., 111 (s. c. Am. Dec., 358); *Pell v. Ball*, Cheves Ch., 99; *Robinson v. Dickey*, 52 Am. St. Rep., 417; *Pickering v. Moore*, 68 Am. St. Rep., 695; *Wetmore v. Zabriskie*, 29 N. J. Eq., 62; *Perry v. Smith*, 42 N. J. Eq., 504.

The demurrer is overruled.

ALIMONY IN A LUMP SUM.

Court of Appeals for Hamilton County.

LUCILE LAWSON BAKER V. THORNE BAKER.

Decided, January 10, 1914.

*Divorce and Alimony—Allowance of Alimony as Fixed on Appeal—
Wife's Inchoate Right of Dower.*

In fixing alimony, in cases where there are no children and the probabilities are that the lives of the parties will diverge, the preferable form of permanent alimony is a lump sum, having in mind the fact that the wife can not be divested of her inchoate right of dower in the real estate owned by her husband during the coverture.

Harmon, Colston, Goldsmith & Hoadly, for plaintiff.

John C. Healy, contra.

BY THE COURT.

Under the rule laid down in *Cox v. Cox*, 19 O. S., 502, on an appeal from a decree for alimony to this court all the issues of fact upon which the rights of the parties depend with respect to alimony are reopened for trial, notwithstanding a divorce was granted in the court below. This divorce is unaffected by the appeal, and this court has no power to review or disturb that part of the decree which relates to the divorce, although the correctness of the decree made by the lower court may well be doubted from a review of the evidence before us. That decree is now a finality and so fixes the status of the parties as they now appear before us that it becomes an element of consideration in determining the question of alimony.

The court has carefully considered all of the evidence submitted to us, which comprises all of the evidence taken in the court below and some further evidence submitted in relation to the property of the respective parties. After full consideration the conclusion is reached that plaintiff is entitled to a judgment against defendant, for permanent alimony in the sum of seventy-five hundred (\$7,500) dollars, this sum to be made pay-

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able, without interest, in installments extending over a period not to exceed four years—the time and amount of such installments to be agreed upon by the parties before the entry of decree, and upon failure of such agreement to be fixed by the court.

In a case of this kind, there being no children, and the probabilities being that the lives of the parties will hereafter diverge, we see no reason for making an allowance of alimony in the form of a continuing order payable in monthly installments, and believe that the payment of a fixed amount within a short time is more in compliance with the provisions of law and will better serve the welfare of both parties. And in fixing the amount named we have in mind that under the provisions of the General Code, 11991, as construed by the Supreme Court in *DeWitt v. DeWitt*, 68 O. S., 340, the court is without power in this case to divest the wife of her inchoate dower in the real estate owned by the husband during the coverture. A counsel fee of \$500 was allowed plaintiff in the court below, and if this amount has not been paid by the defendant, the decree in this court should provide for its payment.

DISCRETION AS TO ORDER OF PRESENTATION OF EVIDENCE.

Circuit Court of Summit County.

HANNAH M. WYLIE V. NETTIE E. KING.

Decided, October 12, 1910.

*Evidence in Chief Introduced Out of Order in Three Cornered Case—
Verdict—Special Interrogatory—Failure to Answer it.*

1. In an action upon a promissory note against a maker and two endorsers, where the maker pleads forgery of her name and the plaintiff and endorsers claim the maker's signature is genuine, it is not an abuse of discretion to permit the endorsers to introduce evidence of the genuineness of the maker's signature after she has rested her defense.
2. A judgment will not be reversed because the trial judge received the jury's general verdict without requiring an answer to be returned to a special interrogatory, where it appears that the parties were in court when the verdict was returned and made no objection to the omission complained of, or that the question asked, if answered, would not have tested the correctness of the general verdict.

HENRY, J.; WINCH, J., and MARVIN, J., concur.

The action below was founded upon a promissory note as follows:

“\$525.85. AKRON, O., Feb. 9th, 1906.

“Two years after date or previous death after date I promise to pay to the order of myself five hundred and twenty-five and 85-100 dollars, at Second National Bank, Akron, O. Value received, with interest at eight per cent. per annum after maturity.

“MRS. HANNAH M. WYLIE.”

Said note is endorsed:

“Demand, notice of non-payment, protest and diligence in collection waived.

“MRS. HANNAH WYLIE,
“C. F. CHAMBERLAIN,
“O. A. HOYT.”

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The defendant, Hannah Wylie, answered that her signatures were forged. The defendants, Hoyt and Chamberlain, answered admitting their secondary liability, denying the alleged forgery and praying that judgment fixing primary liability upon the defendant, Hannah Wylie, might be rendered.

Upon trial to a jury verdict and judgment were rendered against all the defendants. Hannah Wylie seeks by petition in error here to reverse this judgment.

The note is claimed to have been given by Mrs. Wylie in payment of the first premium on a life insurance policy issued to her through Hoyt and Chamberlain, agents of the insurer. Mrs. King, the plaintiff below, became the *bona fide* endorsee of the note from Hoyt and Chamberlain.

Among the errors complained of is the alleged abuse of discretion by the trial court in permitting Hoyt and Chamberlain, after the defendant had rested, to introduce expert testimony upon handwriting to defeat her defense of forgery. Seasonable protest had been made that all such evidence ought to be introduced in connection with plaintiff's case in chief. But in the triangular case which resulted from the raising of an issue between the defendant Wylie and the other defendants below, it was impossible to exclude the defendants Hoyt and Chamberlain from their right to reply to their co-defendants' defense of forgery by allegation and evidence that her signature was genuine. It follows that no abuse of the trial court's discretion can be predicated of its ruling.

Error is also assigned upon the court's reception of the jury's general verdict without any answer being returned by them to a special interrogatory submitted at the request of the defendant Wylie. Either of two complete answers may be made to this contention: First, that in contemplation of law the parties were in court when the verdict was returned and should then and before the jury's discharge, have objected to the omission complained of. Secondly, that the interrogatory was not such as that an answer thereto would tend to test the correctness of the general verdict. The interrogatory is as follows: "Was the defendant, Hannah M. Wylie, at her home in Akron, on Friday, February 9th, A. D. 1906, from 8 o'clock A. M. to 4 o'clock P.

M.?" The testimony tended to prove that the execution of this note by Mrs. Wylie took place at her home on this date and between these hours. But an answer, either yes or no, to the question as submitted would not necessarily have indicated that she was continuously present or absent during the whole period named. The trial court said to the jury on submitting this interrogatory "This question is not decisive of the question in the case, but is merely a finding of fact or interrogatory to be answered by you on one feature of it." This, also, is complained of as error. But the court's observation was literally true. It was not the controlling issue. That issue was simple, viz: were Mrs. Wylie's signatures genuine? The court's charge is not very elegant in style, but it sufficiently indicated the point in controversy and the jury's duty. Upon consideration of all the evidence we are impressed that the jury's verdict was right and the judgment is therefore affirmed.

CHILD RUN OVER BY STREET CAR.

Circuit Court of Cuyahoga County.

MYRON J. MORGENROTH V. THE NORTHERN OHIO TRACTION &
LIGHT COMPANY.

Decided, October 12, 1910.

Street Railroad Accident—Child Playing in Street—Care Required of Company—Charge—Matters Omitted Must Render Charge Misleading.

1. In an action for damages against a traction company for injuries sustained by a child run over while playing in the street, a request to charge the jury, "That a street railway company in the operation of its cars upon the public streets is required to exercise more care at those places where children congregate and play than is ordinarily required," should not be given, for "ordinary care" is the standard, and not "more care than is ordinarily required."
2. A general exception to the court's charge does not go to matters omitted, unless such omission renders the charge misleading.

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HENRY, J.; WINCH, J., and MARVIN, J., concur.

After the exhaustive argument and re-argument of this case and the intimations given upon the hearing upon minor points in the case, we confine our attention now to two main questions.

An infant too young to be guilty of contributory negligence was run over by defendant's street car and lost its legs. The jury found for the defendant.

There was some evidence to show that children were wont to play near the scene of the accident and the plaintiff below before argument in writing requested the court to charge upon that subject as follows:

"4. That a street railway company in the operation of its cars upon the public streets is required to exercise more care at those places where children congregate and play than is ordinarily required. And it is the duty of the railway company to know at what places, if any, small children are in the habit of congregating and playing.

"And if the jury find from the evidence that small children were in the habit of congregating and playing at or near the place of this accident at and prior to the time of this accident, it would be the duty of the defendant company to exercise more care in the operation of its cars at this point than is ordinarily required, and failure to do so would be negligence on the part of the defendant company."

This was refused (over exception) and, as we think, properly so, because "more care than is ordinarily required" is too vague a standard to fix for the jury's guidance. Indeed it is absolutely erroneous; for "ordinary care" is the standard, and not "more care than is ordinarily required." It may possibly be questioned, too, whether the duty of the company to know is not too broadly affirmed. But the subject was thus properly brought to the court's attention and a correct charge on the subject was called for (*Lytle v. Boyer*, 33 Ohio St., 506). But it was nowhere given, except abstractly, in the general charge, in the statement that the amount of care required of the defendant varied with the amount of danger encountered. The only exceptions reserved in this behalf were the exception to the refusal to give plaintiff's said request before argument and the general

exception, under the statute, to the charge as given. Neither of these exceptions alone, nor the two combined, suffice to save the precise question here sought to be made. The request was erroneous, and the general charge as it stands is not. A general exception to the court's charge does not go to matters omitted, unless such omission renders the charge misleading. It can not be said that this charge is misleading. It contains no affirmative error. The court's ruling to which the first exception was addressed was strictly correct. So was the court's charge to which the second exception was addressed. Neither exception is well taken. A majority of the court (our brother Marvin dissenting) hold that a specific exception should have been reserved to the omission of the trial court to charge correctly upon the subject-matter brought to its attention by the plaintiff's technically imperfect request. *Columbus R. Co. v. Ritter*, 67 Ohio St., 64.

The other question is upon the defendant's first request to charge before argument which was allowed as follows:

"If you find that the car in question was proceeding up West Market street and approaching Oakdale avenue at a reasonable rate of speed, and you further find that the motorman on said car running westerly saw two little children not in front of his car and in such close proximity thereto as to cause him in the exercise of reasonable care to believe that there was danger of running said two children down, and you find that, in the proper discharge of his duty to said children, he watched them as they went across the track until they got beyond the sphere of danger, and that by reason of his attention being attracted by said children crossing the track he did not see the Morgenroth boy approach the car that he was running until it was too late to stop his car, by reason of which the said Morgenroth boy was run over, the defendant would not be liable."

This was excepted to for the reason that it fails to take into account the motorman's possible opportunity to see the Morgenroth boy approaching the car before his attention was distracted by the other two boys' danger and in time to avoid injuring any of the three. We think this distinction is a little too finely drawn both in fact and in law. If, as the request expressly presupposes, *the cause* of the motorman's failure to see the Morgenroth boy was the distraction of his attention by the other boys' dan-

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ger, how can it be claimed that such failure was *caused* by the motorman's previous inattention? If, moreover, as the request further presupposes, he was in the exercise of ordinary care in all that he did while the boys were within the sphere of danger, what more can the law require? The various requests given seem to have fully presented every aspect of the case, except as already discussed, and we think that defendant's first request as given does not conflict with any other view which the jury were or should have been free to consider.

We have given an unusual amount of time and attention to this case, and, pending the re-argument, we called to counsel's notice the difficulties which we had encountered in our previous deliberations upon it, to the end that we might have the utmost aid that might be afforded to us.

We find no error in the record and the judgment is affirmed.

BEQUESTS TO CHILDREN OF DIFFERENT FAMILIES.

Circuit Court of Summit County.

SYLVESTOR FALOR ET AL V. LEWIS D. SLUSSER ET AL.

Decided, October 12, 1910.

Will—Construction of.

Under a bequest of "the balance" of testator's estate to be "divided among the children living of Isaac and Jacob Falor, and Alice and Henry Reaves, of Swan, Iowa, share and share alike, providing they are living at my death," Alice and Henry Reaves share and share alike with the children living of Isaac and Jacob Falor.

HENRY, J.; WINCH, J., and MARVIN, J., concur.

This proceeding in error, brought here upon a record exhibiting only the pleadings in the case below, no evidence having been introduced there, challenges the correctness of the common pleas court's construction of the twentieth item of the will of Lydia Scanes Jackson, deceased. This item reads:

“The balance, if any, after paying all the above bequests and all my just debts and the expenses of settling up my estate, and all other just debts, shall be divided among the children living of Isaac and Jacob Falor, and Alice and Henry Reaves, of Swan, Iowa, share and share alike. Providing they are living at my death.”

The question submitted by the petition of the administrator *de bonis non* with the will annexed is “whether Alice and Henry Reaves are to share and share alike with the children living of Isaac and Jacob Falor, or whether the children of Alice and Henry Reaves living at the time of testatrix’s death are to share and share alike with the children living of Isaac and Jacob Falor.”

The court below embraced the latter alternative; but we hold that the former alternative is the correct construction.

We come to this conclusion because of the comma after the word “Falor” and because of the concluding proviso, which repeats the word “living.” The natural meaning of the language excludes the children of Alice and Henry Reaves.

Judgment reversed because contrary to law and final judgment is here rendered according to the view here expressed.

The administrator is allowed \$25 for his attorney’s fee in this court, in addition to the amount ordered below.

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**ACTION UPON A GUARANTY OF PAYMENT FOR
MERCHANDISE.**

Circuit Court of Cuyahoga County.

C. F. GUNTHER V. F. O. PFAFFMAN.

Decided, March 20, 1911.

Guaranty of Credit—Acceptance—Payments by Debtor.

1. No formal acceptance of a guaranty of credit to be extended to a third person is necessary to make it binding upon the guarantor.
2. In the absence of directions to that effect, one who guarantees any indebtedness incurred by a third party to plaintiff after a certain date, is not entitled to have payments thereafter made by the debtor to the plaintiff credited on the guaranteed items rather than on earlier items not guaranteed.

M. B. & H. H. Johnson, for plaintiff.

R. H. Lee, contra.

MARVIN, J.; WINCH, J., and HENRY, J., concur.

The parties here are as they were in the court below. The plaintiff sued the defendant upon an account for goods sold and delivered by plaintiff to W. P. Chase Company, the payment for which goods, the plaintiff says, was guaranteed by the defendant. The case was tried to the court without a jury, by consent of parties. At the close of plaintiff's evidence the court sustained the motion of the defendant for judgment in his favor; plaintiff duly excepted.

If there is such guarantee it is found in letter of defendant to plaintiff, dated February 19, 1908, which reads:

"C. F. GUNTHER, Co.,
Chicago, Ill.

"*Gentlemen:*

"I have just received a letter from W. P. Chase & Co. of Los Angeles, in which they state that you are pressing them a little too hard for money and asking me to explain matters to you.

"I called on this firm during the early part of January and was very favorably impressed by both Mr. Chase and Mr. Crane.

We have done business with them for a number of years and they always gave us good results for the same.

However, I will confess frankly that they impressed me as being honest, able and aggressive, but somewhat short on cash. In other words, they were long on brains but short on cash.

"I quickly realized that they would be able to accomplish wonders with the necessary amount of cash and I volunteered to back them. I will make this prophesy; that they will be the most prominent brokerage house in Southern California within the next year, and will have their choice of accounts from all over the United States, as they are running the brokerage business on correct and up-to-date lines. Any appreciation shown them at present will be amply rewarded in the near future.

"If there is any question in your mind regarding the possibility of losing money on them, I will go on record as guaranteeing you against any loss you may have in giving them credit. Furthermore, I will assure you that within the next 90 days they will be in a position to pay promptly for everything. Should you at any time become alarmed regarding their financial condition or think it good business to break off connections with them and want your money immediately, inform me and after I have them O. K. the amount, I will send you a check by return mail. There is not another concern in the United States whom I would guarantee in this manner. I am not casting any reflections on the honesty of any other concerns, but I wish to impress upon you the fact that when it comes to ability and integrity W. P. Chase & Co. stand out prominently on the Pacific Coast.

"Yours very truly,

"F. O. PFAFFMAN."

At the time the letter was written Chase & Co. were indebted to plaintiff in a considerable amount. After the letter was written the plaintiff sold goods in considerable amount. Payments were made from time to time by Chase & Co. to plaintiff on account, after receipt of this letter. The amount of such payments was in excess of the amount of goods sold, within the same time and was also in excess of the amount owing at the time the letter was written, but was less than the aggregate amount of the debt existing at the date of the letter and the sale made subsequent to such date, so that at the close of the business between the parties, there was remaining due to the plaintiff the sum of \$986.64. This amount was admitted by the

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counsel for the defendant, as appears at page 4 of the bill of exceptions.

The real questions arising in the case are:

Did the defendant give an absolute guarantee for payment of goods which plaintiff should furnish to Chase, after February 19th?

It not, did he give a conditional guarantee, the conditions of which have been complied with?

If either of the above is answered in the affirmative the question remains, is the defendant entitled to have payments made by Chase to plaintiff *after* February 19, 1908, credited upon the account accruing *after* the same date rather than upon indebtedness existing at that date.

The language of the letter taken as a whole seems clear that the defendant meant to do more than simply to express great confidence in Chase & Co. as urged on part of plaintiff in error. True, it does this and in strong language, before the fourth paragraph of the letter was reached; this paragraph reads: "If there is any question in your mind regarding the possibility of losing money on them I will go on record as guaranteeing you against any loss you may have in giving them credit." Then follows an assurance that they would be in condition to pay promptly within 90 days for everything. Certainly up to this point of the letter sufficient confidence in Chase & Co. had been expressed to satisfy anyone that defendant had full faith in that firm, and desired to impress that faith upon the plaintiff, but defendant was not content with this, he decided to go further and so added, as a new and additional sentence: "Should you at any time become alarmed regarding their financial condition, or think it good business to break off connections with them, and want your money immediately, inform me and after I have them O. K. the amount, I will send you check by return mail." If, after this language is used, there could be any doubt that defendant intended that this should be an absolute guarantee and should be so understood by plaintiff, it would seem to be settled by the next sentence which reads: "There is not another concern in the United States whom I would guarantee in this manner."

Surely he did not mean that this was not the only concern of which he would speak in high terms of praise, but for this firm he would go further and *guarantee* the payment for goods which they might purchase from the plaintiff.

That this was understood by the plaintiff to be a guarantee absolute, and that the defendant was so notified by him is evidenced by plaintiff's letter to defendant of February 24, 1908, which begins with these words:

"We have your letter dated February 19th, guaranteeing Mr. Chase and Chase's Brokerage account in Los Angeles for which we thank you."

If there was any necessity for acceptance of the guarantee in order to hold defendant, surely this letter with the continuing to sell goods to Chase & Co. was sufficient. Under the Ohio authorities, no formal acceptance is necessary. *Stearns' Suretyship*, Section 66; *Powers et al v. Berncratz*, 12 Ohio St., 273; *Birdsall v. Heacock*, 32 Ohio St., 177.

That the defendant understood this to be a guarantee is clearly evidenced by his letter to plaintiff of September 18th, 1908, in which he says:

"This replies to yours of the 16th inst. requesting me to pay certain bills of the W. P. Chase Co. of which I guaranteed the payment. I am surprised to note that it amounts to such a great amount. I will take the matter up with W. P. Chase Co. immediately, and have the account verified, and then I will take care of you. Kindly note, until further notice, I will not be responsible for any more of W. P. Chase Company's accounts."

Counsel for defendant in error urges very strenuously that contracts of guarantee, like all other contracts, must be construed so as to carry them out in accordance with the understandings of the parties, and cites numerous authorities in support of this proposition. What has already been said seems to establish that both the plaintiff and defendant understood this to be a guarantee, and we hold that it was.

If it be said that there was a condition to this guarantee that it should be operative only when plaintiff should become alarmed, "or think it good business to break off connections with Chase &

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Co. and want his money immediately," this condition is surely met by the letter of September 16, 1908, written by plaintiff to defendant in which this is said:

"You stated in your guarantee, that at any time we were dissatisfied with the account, you would send us a check for same. Now we would appreciate it very much if you would attend to this at once, as we do not care to continue doing business with the W. P. Chase Company the way things have been running of late."

As already shown, defendant by letter of September 18, 1908, to plaintiff, said he would immediately take the matter up with Chase & Co., and have account "*verified*" and remit amount to the plaintiff. This suit was not brought until March 20th, 1909.

It does not appear that defendant did or did not learn from Chase & Co. whether the account was all right, but he admits at the trial, that it is, and as Chase & Co. notified plaintiff on October 9, 1908, that the account was correct to the amount of \$884.59, as shown by letter of that date sent with statement to plaintiff, the defendant is not to be relieved because it is not affirmatively shown that he got direct notice from Chase & Co. before the trial, or before suit was brought that the account was O. K.

As to the application of payments made after the date of the letter of guaranty upon the prior indebtedness, as he did, the guarantor was not entitled to have them applied to the latter account in the absence of and direction to that effect being given to the plaintiff at the time the payments were made. *Birdsall v. Heacock*, 32 Ohio St., 177; *Gaston v. Barney*, 11 Ohio St., 506, and *Stearns' on Suretyship*, Section 96, and authorities there cited.

We come then to the conclusion that the court erred in dismissing the petition and the judgment is reversed as being contrary to law.

WHEN A COURT MAY CHARGE UPON CONTRIBUTORY NEGLIGENCE.

Circuit Court of Cuyahoga County.

THE INTERSTATE ENGINEERING COMPANY V. SAM COLECHIA.*

Decided, March 20, 1911.

Master and Servant—Negligence—Charge as to Contributory Negligence.

In a personal injury damage case it is not error to charge upon the subject of contributory negligence, where that is made an issue by the pleadings, and there is evidence tending to establish the fact that the injury was received wholly as the result of the plaintiff's negligence, not partly by reason of his contributory negligence.

Seaton & Paine, for plaintiff in error.

Harry Payer, contra.

MARVIN, J.; WINCH, J., and HENRY, J., concur.

The parties here stand in relation inverse to that in which they stood in the court below, but will here be spoken of as in the original case.

The defendant is a manufacturing corporation, with its plant at Bedford in this county. The plaintiff was in its employ, and while in its employ on the 7th day of January, 1908, was severely injured by the falling of a heavy pile of angle irons upon him while engaged in his work. He claims that this injury was caused by the negligence of the defendant, and without any negligence on his part. The result was a verdict and judgment in favor of the plaintiff.

It is urged that this judgment should be set aside, first, because it is said that it is against the weight of the evidence. After a careful examination of the evidence, we are not prepared to say that this claim is well taken, and the case can not be reversed upon that ground.

*Affirmed without opinion, *Interstate Engineering Co. v. Colechia*, 86 Ohio State, 318.

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Without entering into details as to the facts, it is clear that if the plaintiff was entitled to recover, it was because of the negligence of one Joe Kelley, another employee of the defendant.

On the part of the plaintiff it is claimed that this man Kelley was his superior; that he had a right to direct him what to do; that he did direct and control him, and that therefore the negligence of Kelley was the negligence of the company.

On the part of the defendant it is claimed that Kelley had no authority over the plaintiff, but was his fellow-servant on an equal footing with him; the defendant, by its answer, says that the accident was due entirely to the negligence of the plaintiff, but that if that be not true, the negligence of the plaintiff contributed to the injury.

The language of the answer in that regard is in these words:

“Second defense. Further answering and for a second defense defendant says that any injuries complained of (sustained by plaintiff) were due to the plaintiff's own negligence in the premises; and further answering, defendant says that if it was negligent (which it denies) plaintiff's own negligence contributed directly and proximately to the injuries which he sustained and about which he complains.”

The evidence of the plaintiff, if it be true, and certainly that evidence in connection with the evidence of Rigrio Riomundo, might well cause one to believe that Kelley was the superior of the plaintiff, but all the evidence taken together leaves the question in grave doubt; it is by no means clear however that the jury went wrong in finding that Kelley was the superior of the plaintiff. The injury was caused by the falling of these angle irons, already mentioned, upon the plaintiff's legs, but the cause of such falling is in dispute. On the part of the plaintiff, evidence is given tending to show that it was because of the negligence of Kelley. On the part of the defendant the evidence tends to show that the accident was caused by the negligence of the plaintiff. The jury reached the conclusion that the injury was caused by the negligence of Kelley. Without reciting the evidence, though we have examined it with care, we are not prepared to say that the jury were wrong in reaching the conclusion that Kelley's negligence was the cause of the injury.

It is claimed on the part of the defendant (plaintiff in error) that there was no evidence tending to show that the plaintiff contributed by his negligence to his injury, but that under the circumstances and the evidence the injury was wholly caused by the plaintiff's negligence, or wholly caused by the negligence of Kelley; that there was no contribution on the part of one to the other. The negligence of one or the other, the defendant says, was the sole cause of the injury. We are not prepared to say that the defendant might not, under this evidence, have made the claim that even though Kelley were negligent, the plaintiff's negligence did not *contribute* to the injury. What has already been said sufficiently indicates that the case will not be reversed as being against the weight of the evidence.

Complaint is further made, however, that the court erred in its charge to the jury, in that the court instructed the jury upon the issue of contributory negligence, when it is claimed, as already stated, by the defendant, that no such issue was made by the evidence. Whether this claim can be maintained or not, we think there was no error in the charge of the court on the subject of contributory negligence, for the reason that this defense was set up in the answer, and thereby an issue was raised as to whether plaintiff contributed to the injury. Certainly, unless it was beyond the possibility of question that no reasonable claim could be made from the evidence that the plaintiff contributed in any degree by his negligence to his injury, it was proper for the court to charge upon the issue of contributory negligence as made in the pleadings, and we think it was proper, in any event, to charge upon it.

One of the paragraphs complained of in the charge is in these words:

"If these three charges, that is to say, first, that Kelley was plaintiff's superior, second, that he ordered plaintiff to assist as aforesaid, and third, that Kelley was negligent as aforesaid, if those three claims are proved by a preponderance of the evidence then your verdict should be for the plaintiff, unless it has also been proved by a preponderance of the evidence that plaintiff was himself negligent, his negligence contributing to his injury, in which state of the proof your verdict should be for the defendant.

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“As to this claim that the plaintiff was negligent the burden of proof is upon the defendant. And the evidence bearing upon that question must preponderate in favor of the defendant's claim of contributory negligence in order that you may find it proved. If it does not so preponderate then it is not proved and does not stand in the way of recovery, if a right of recovery is shown by the evidence relating to those other issues that I have stated.”

Another paragraph of the charge is in these words:

“I have said to you as to the claim made by the defendant that the plaintiff was negligent, that is negligence contributing to his injury, I have stated to you that upon that claim the burden is upon the defendant. There is an exception to that rule as to where the burden lies. If from the plaintiff's own evidence, evidence produced by the plaintiff, there is a fair inference from the evidence that the plaintiff was negligent, his negligence contributing to his injury, then the burden would be upon the plaintiff to remove that inference. That circumstance, this inference fairly arising from plaintiff's own evidence, places the burden upon him to clear himself of that inference. If such inference has arisen from the plaintiff's own evidence then the burden as I have said would be upon him. If there is no such inference, then the general rules I have stated would apply and the burden would be upon the defendant.”

The fault that is found with this is that it places the burden of establishing the negligence of the plaintiff, upon the defendant. Whereas, it is said, that if the court had charged only upon the question of negligence on the part of the plaintiff as being the sole cause of the injury, this burden would not have been upon the defendant.

It will be noticed, however, by the language quoted in the charge, that it was only contributory negligence, the burden of proving which was placed upon the defendant. Indeed, no complaint could properly be made of the language used by the court, if the question of contributory negligence was in the case. We think it *was* in the case, because so made by the pleadings, and that the charge was not erroneous in the matter of placing the burden, and so we find no error in the record of this case, and the judgment is affirmed.

ENCROACHMENT OF WALL ON ADJOINING LOT.

Circuit Court of Cuyahoga County.

**THERESA QUIGLEY AND W. S. BLAU V. THE FIREPROOF
STORAGE COMPANY ET AL.**

Decided, March 20, 1911.

Injunction—Trespass by Painting Sign on Side Wall.

One whose side wall has been erected over a few inches on the land of another without seasonable objection by the other, will yet be enjoined from thereafter painting a sign upon said side wall, upon complaint of such other.

Cyrus Locher, for plaintiffs in error.

Henderson, Quail & Siddall, contra.

MARVIN, J.; WINCH, J., and HENRY, J., concur.

The plaintiff, Quigley, owns a parcel of land situated on the north side of Euclid avenue in the city of Cleveland. The defendants own a parcel of land immediately east of the above named plaintiff's parcel, also abutting on Euclid avenue. On the parcel of land of the plaintiff Quigley, is a dwelling-house, occupied by the plaintiff Blau as a residence, under lease from the plaintiff Quigley. On the lot of the defendant is a large brick business block which extends southerly to the north line of the avenue; that is, it comes out clear to the front of the lot; whereas the dwelling occupied by the plaintiff Blau, stands back from the avenue about 50 feet. There is a dispute between the parties as to where the true boundary line between their properties is, but from the evidence we find that the true boundary line is as claimed by the plaintiffs; that is, some six inches further east than the claim of the defendant would make it.

It is admitted that if this be the true line between the lots, as we find that it is, the building of the defendant extends a few inches over the line upon the land of the plaintiff Quigley. It is not sought in this action to restrain the defendant from using its building to the full extent for which it was intended, or for

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which it can be used. It is probable that the plaintiff, Quigley, by failure to notify the defendant while the building was being constructed that her land was being encroached upon, could not now maintain an action in ejectment or to enjoin the use of the building. In any event, that is not what she seeks here, but the defendant, at the time this suit was begun, was proceeding to paint upon the west wall of its building a large sign, announcing its business as that of storing and moving furniture and other chattels. This sign, if completed, will contain a large picture of a moving van with a team attached to it, and upon the van the name of the company in large letters. This wall is of red brick, and the ground work upon which the sign is to be painted is already painted upon the wall in white, and a part of that which is to be painted on the white is already on. This painting will be so far to the front of the west wall of the building and so high from the ground as to be in plain sight of whoever sits at the windows of the residence of the plaintiff Quigley's property.

In doing the work which has been done upon this sign the defendant has placed large coils of rope and other tackle on the front lawn of the said plaintiff's property, near to the wall it is true, but still in such wise as to be a trespass upon this lawn. Both plaintiffs pray that the defendant be enjoined from completing this sign; from placing any material upon the plaintiff's land, and that it be required to remove so much of the sign as has already been painted, or in some other wise restore the west wall of its building to the condition it was in before anything was done toward the painting of this sign.

It is urged on the part of the defendant that this relief ought not be granted, because, it is said, it would impose an expense upon the defendant and would be of no value to the plaintiff to have it done; that is, that the plaintiff suffers no damage by having this sign completed, even if technically the defendant is without right to put up the sign.

That the plaintiffs are entitled to have an injunction to prevent the defendant from placing any of its material upon the plaintiff's property goes without saying; and we are of the

opinion that the plaintiff Quigley is entitled to a further order of the court. The plaintiff Quigley has permitted the defendant to construct its building, as it has, over upon her land, and thereby it may be conceded, so far as this case is concerned, that her only redress for such construction of the building will be in damages; but we think that beyond that she is not estopped, after ascertaining her rights, from attempting to prevent anything to be done to such part of the building that is upon her land as will in any wise interfere with the full enjoyment of her property. And if she is entitled to any relief, it would certainly seem to be by injunction. This great sign, staring out as it will upon this residence, may well be an annoyance to those who occupy this residence, and yet it is that kind of an annoyance for which damages in a suit at law could not well be measured, and that being so, injunction seems to be her only relief. In the case of *Pollock v. The Cleveland Ship Building Company*, 56 Ohio State, 655, in the opinion at page 674 thereof it is said:

“It is by no means clear, that they would not, if pursued long enough, grow into a prescriptive right. It isn't necessary to ascertain this with positiveness. It is enough that if there be any doubt, the risk should not be imposed upon the plaintiff. And it is no hardship upon defendant to say that if it needs to use plaintiff's land it can do as other people do in like circumstances—obtain a right to such use by negotiation. The very fact that the trespasses are in themselves trifling, and the damage, if any, so small that suits at law to recover would be impracticable, affords an additional reason for granting an injunction.”

High on Injunctions, Section 696 (4th Edition), uses these words:

“So equity may properly interfere to restrain repeated and continuous trespasses where it would be difficult or impossible to ascertain the damages resulting from each act complained of. So also relief may be granted, where from the nature of the case, it will be impossible to estimate the actual damage, which the plaintiff will suffer, and the injury resulting from a trespass in order to be a continuing one justifying relief by injunction must be of such a character that its recurrence is not dependent upon any act to be done by any person, but results from a continuing state or condition of things caused by the act of trespass itself.”

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In *Wilson v. The City of Mineral Point*, 39 Wis., 160, it is held that injunction is the proper remedy against cutting down shrubbery and shade trees, on the ground that injury is such that damages are indeterminable.

In *Joyce on Doctrine and Principles of Injunction*, Section 218, it is said that injunction is proper, where the injuries can not be measured by any pecuniary standard or where it is impossible or hardly possible to so measure them.

To leave the wall as it now is would leave it, perhaps, in as objectionable a state as it would be in if the sign were completed. It will not be any considerable expense to the defendant, by the use of paint or some other material, to so obliterate this white paint which has been placed upon the wall and so much of the sign as is on said white paint, as to practically restore the wall to the appearance which it had before this painting was begun, and the order of the court will be that the defendant is enjoined from placing any materials upon the lawn of the plaintiff Quigley; from proceeding with the work of painting this sign, and that it obliterate what has been done to the extent that it can reasonable be done by the use of red paint, or otherwise, as shall best accomplish the result.

RECOVERY FOR DEATH OF A CHILD IN AN ELEVATOR.

Circuit Court of Cuyahoga County.

ALEXANDER CAMPBELL, V. BUELA TARR, ADMINISTRATRIX OF THE ESTATE OF JAMES WINIFORD TARR.

Decided, March 20, 1911.

Wrongful Death—Infant—Negligence of Beneficiary—Amount of Judgment.

In an action for the wrongful death of a child five years old, a judgment for \$1,800 will not be set aside, though there is some evidence that the mother, one of the beneficiaries, was negligent, and that the father had deserted the mother and child.

MARVIN, J.; WINCH, J., and HENRY, J., concur.

The relation of the parties here is the reverse of that which they sustained to one another in the court of common pleas, but they will be spoken of here as they stood in the court below.

Plaintiff recovered judgment, under the statute authorizing such actions, for wrongfully causing the death of plaintiff's decedent.

On the 25th of January, 1908, decedent, who was then five years old, was killed in an elevator operated in a large building owned by the defendant.

This building was several stories high and was occupied in the stories above the ground floor, by a considerable number of tenants, for living rooms. Plaintiff, who was the mother of the deceased, lived in one of the upper suites, together with plaintiff's mother.

The elevator was in common use by the tenants of the upper floors, for going up and down.

Without question, the evidence shows that the defendant allowed this elevator to be and remain for a long time so out of repair as to render it unsafe. The door could be so far opened by any one as to permit entry to the elevator.

The decedent, while at play in the lower hall of the building, got into this elevator, which he could not have done but for the negligent manner in which it was maintained by the defendant, of which negligence the defendant was surely chargeable with knowledge. The elevator was moved upward and the child crushed.

Owing to the age of the child no want of care on his part could affect the question of recovery in the action.

Since, however, this action can be maintained only for the benefit of the next of kin of the deceased, as provided in Section 6135, Revised Statutes (General Code, 10772, 10773), and since any such next of kin whose negligence contributed to the death is not entitled to any compensation on account of such death, as held in *Wolf, Adm'r. v. Railway Company*, 55 Ohio St., 517, the question of the negligence of this plaintiff, mother of deceased, becomes a subject of inquiry.

The mother was employed in a store on the east side of the river. The defendant's building in which she, her mother and

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her child lived, is on the west side of the river, a considerable distance from her place of employment. On the day of the accident she came to her home for her noon meal. Having eaten, she went down to the ground floor, accompanied by her little son, bade him good-bye at the door, and left for her work.

Without going into details, we think the jury might well have reached the conclusion, as they probably did, that she exercised ordinary care for the protection of her child. We have said the jury probably found, and might well have found, that the mother was not negligent. However, if they found otherwise as to her, it would not *necessarily* have barred a recovery, because the father of the child was living, and, under the statute, is one of those for whose benefit the action may be maintained. Under the facts, however, as disclosed in this case, the jury would not be likely to do much for the father. And as the verdict was for \$2,500 it can not be doubted that the jury found, as to the charge of negligence against the mother, in her favor.

Section 6135, Revised Statutes (General Code, 10773), provides that the amount recovered shall be apportioned among the beneficiaries by the court by whom the administrator is appointed; so with such distribution this court has nothing to do, nor has the court of common pleas anything to do with it. The amount returned by the jury was the gross sum of \$2,500. This is in accordance with the statute, and with the holding of the court in *Wolf, Adm'r, v. Railway Co., supra*. In this case it is said in the opinion at page 536:

“As to the beneficiaries found guilty of contributory negligence, no damages should be awarded on their account, and the jury should find in its verdict, which, if any, of the beneficiaries were guilty of such contributory negligence.”

The verdict in the present case makes no finding that any beneficiary was chargeable with negligence, and therefore the presumption is they found, as hereinbefore suggested, that the mother was not negligent.

No negligence could be charged to the father in the case.

On motion for new trial, the court, as condition for not granting a new trial required a remittitur of \$700 from the amount

found by the jury. This remittitur was made and judgment entered for \$1,800.

As we find no error on the record, the judgment is affirmed.

**DISMISSAL OF A CASE ON APPEAL NOT A BAR TO A
NEW ACTION.**

Circuit Court of Cuyahoga County.

JOSEPH ARTINO V. SANTO LAPARO.

Decided, March 24, 1911.

Judgment of Dismissal on Appeal—No Bar to Another Action.

Upon judgment in favor of plaintiff by a justice of the peace, defendant appealed the case to the common pleas court and there obtained a dismissal of the case for failure of plaintiff to file a petition. Thereupon the plaintiff brought another action on the same claim before a justice of the peace. *Held:* The judgment of dismissal of the former action was no bar to the maintenance of the latter action.

Samuel Doerfler, for plaintiff in error.

William H. Chapman, contra.

MARVIN, J.; WINCH, J., and HENRY, J., concur.

The plaintiff below was Laparo. He brought suit against Artino, before a justice of the peace, and recovered judgment.

The defendant appealed the case to the common pleas giving his bond therefor and filing transcript from the docket of the justice of the peace, with the clerk.

The plaintiff failed to file petition within the statutory period, and on motion of the defendant, the case was dismissed in the common pleas court.

Plaintiff sued again before a justice of peace, on the same claim. Defendant produced the record of the proceedings in the former case, claiming the same as a bar. The result was a judgment again in favor of the plaintiff. The defendant prosecuted error to the common pleas on this last judgment and, on hearing the judgment of the justice of the peace was affirmed.

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The present proceeding is brought to reverse this judgment of affirmance and the judgment of the justice of the peace. The question therefore presented is whether the proceedings in the former case constituted a bar to the latter suit on the original claim. On the part of the plaintiff in error it is urged that to permit that to be done which was done in this case, would enable a plaintiff to harrass a defendant beyond all reason, and therefore it should not be permitted.

This would be equally true if plaintiff, after bringing his suit before the justice of the peace had dismissed it before its being brought to trial, and yet, without question he could have done this, and again bring suit on the same claim.

As said in the brief of plaintiff in error, the giving of the appeal bond and the filing of the transcript suspended the judgment which had been taken, and if the plaintiff had filed his petition in the proper time the case would then have been in the common pleas, to have been proceeded with as though originally brought in that court. Suppose this had all been done, and the case had thereafter been dismissed for some reason other than upon the merits, the plaintiff would not have been barred from suing again, and there seems no good reason why the dismissal of the case for failure to file a petition should work any more severely upon the plaintiff than a dismissal after the filing of the petition, for want of prosecution or for any cause other than upon the merits.

The case cited by counsel for plaintiff in error, *B. & O. R. R. Co. v. The City of Washington*, 34 Bulletin, 266, materially differs from the case at bar.

In that case judgment was rendered in favor of the *defendant* in the lower court. The plaintiff appealed, and then asked leave to dismiss the case without prejudice. This, if granted, would have left the party who had obtained a judgment below deprived of the benefit of that judgment by the simple act of the losing party, without any further hearing on the merits.

In the case at bar, the plaintiff, by failure to file his petition in time, lost the benefit of his judgment obtained before the justice of the peace, but he deprived the other party of nothing.

Section 5314, Revised Statutes, providing for dismissal of a case without prejudice to a new action, after enumerating the causes, says:

“In all other cases the decision must be upon the merits upon the trial of the action.”

In *Loudenback v. Collins*, 4 Ohio St., 251, it is said in the head-note, and borne out by the opinion, that to render the dismissal of an action a bar to a new action on the same cause, it must be established that the dismissal was upon the merits.

Here it is shown affirmatively that the dismissal was not upon the merits. The result is that such dismissal is not a bar to a new action and the judgment is affirmed.

WHEN A RECEIVER MAY BE APPOINTED FOR A CORPORATION.

Circuit Court of Cuyahoga County.

EDWARD L. BROWN V. THE BROWN AUTOMATIC HOSE COUPLING COMPANY.

Decided, March 24, 1911.

Receiver—Ancillary to Other Relief.

A receiver will not be appointed for a corporation except as ancillary to the working out of other relief to which the plaintiff is entitled.

R. E. McKisson, for plaintiff.

Harry F. Payer and *J. A. Nally*, contra.

MARVIN, J.; WINCH, J., and HENRY, J., concur.

The petition here sets out that the defendant is a corporation; that it is indebted to the plaintiff in the sum of \$1,400 upon an account; that he is a stockholder, general manager and vice-president of the defendant, and that by reason of certain action on the part of other stockholders and officers of the company, the plaintiff is being prejudiced in his rights. But, on examining

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the claims which he makes and the prayer of the petition, we are unable to find that he is entitled to or claims any final judgment in this action. His suit is sought to be maintained in equity and the prayer of the plaintiff is that the "defendant be temporarily restrained from removing any of its assets and property from the jurisdiction of this court or the county of Cuyahoga until further order of this court; that said defendant company be required to set up why a receiver should not be appointed or a permanent restraining order be not made; that said defendant company be restrained and enjoined from selling or disposing of any of its property at any time or place until further order of this court; except that it may carry on its commercial business in the usual way; that it be ordered that its business and affairs be conducted in Cuyahoga county; and further, and until the further order of this court, that a receiver may be appointed to conduct or liquidate all of the affairs and assets of the defendant company, and that the receiver may be ordered to carry on the affairs and business of the defendant company subject to the orders of this court from time to time; that at the final hearing of this cause a permanent injunction shall issue until the affairs of this company may be worked out by the receiver for the interests of all stockholders and creditors, and for such other and further relief as equity and good conscience shall require.

A receiver was appointed in the court of common pleas and he took charge of the business of the company, and upon final hearing the court found that the plaintiff was not entitled to an injunction and discharged the receiver. The case being appealed to this court the order discharging the receiver was vacated, but as has already been said, the only purpose, so far as appears, for the continuance of a receiver is, that instead of having the business managed by its officers, it shall be managed entirely by a receiver, the language of the prayer being until such time as "the affairs of this company may be worked out by a receiver for the interests of all stockholders and creditors."

It would be an anomalous thing to appoint a receiver to take charge of a business in a case in which no ultimate judgment or order can be made. The appointment of a receiver is simply

ancillary to the bringing about of some final result. We see no final result here that it is expected any receiver will work out.

It is said in the argument, that probably if the business is left long enough in the hands of a receiver, the parties interested will settle their differences. This suit is brought against no party other than the corporation itself and the facts do not justify the continuance of a receiver for the purpose of inducing the various stockholders and officers of this corporation to come to an adjustment of any difficulties they may have among themselves. Certainly not under the allegations of the petition in this case.

The order of this court will be that the petition be dismissed, the receiver be dismissed; that he make a report to this court of his doings, as such receiver; and this court will make such an allowance to him for his services as a receiver as it shall find to be just and proper, and this amount he will be permitted to retain out of the moneys in his hands which have come to him as such receiver. The balance of such property he will restore to the corporation, and a judgment will be entered against the plaintiff for all the costs in the action, including the amount which the receiver is permitted to take from the moneys in his hands, as his compensation.

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ARREST WITHOUT A WARRANT.

Court of Appeals for Ashtabula County.

JOHN RASEY ET AL V. VIRGINIA CICCOLINO, ADMINISTRATRIX.

Decided, December 11, 1913.

Police—Arrest of Peaceable Person on the Highway Without a Warrant—Authority to Search One Under Arrest.

1. A police officer is not authorized to arrest a person, passing peaceably along a highway without a warrant, on a mere venture without any knowledge or reliable information, though in fact, as afterwards discovered, concealed weapons were found on the person so arrested.
2. A police officer has no authority to search a person passing peaceably along a highway of a municipality until he has placed such person under arrest, and the circumstances must be such as to give reasonable and probable grounds to justify such arrest.

H. R. Hill, for plaintiff in error.*Charles Lauryer* and *M. A. Sonles*, contra.

NORRIS, J.; METCALFE, J., and POLLOCK, J., concur.

The defendant in error, the administratrix, brought an action in the court of common pleas against John Rasey and his bondsmen to recover damages for Rasey causing the wrongful death of her decedent.

John Rasey was a police officer in the city of Ashtabula at the time of the wrongful death complained of, and the other defendants below were on his bond as such officer. It is charged in the petition that Rasey was in the discharge of his duties as a police officer when he wrongfully caused the death of Luigi Ciccolino. The verdict was returned in favor of the plaintiff below and judgment rendered according to the verdict and this proceeding in error is brought to reverse that judgment.

Some rulings of the court below on the questions of law are complained of. The first to which attention is called is the refusal of the court to give certain instructions found on page 141. This is what is contained in the record:

“And thereupon the defendants requested the court to give in charge to the jury, before argument, the following propositions of law, all of which requests to charge were refused by said court.”

Two things might be noted about this record. The first is the request is not made to give in writing—no such request is made. Second, these requests are asked as a whole and not separately. There could be no error on the part of the court to refuse all of them because they are not asked in compliance with the provision of the statute which says, written requests, and second, unless all of them ought to have been given to the jury, then it was not error of the court to refuse all of them.

We might stop here, but certain rules of law are applicable to this case which might be spoken of in connection with these requests. The court was asked to charge the following:

“The reasonable and probable grounds that will justify an officer in arresting without a warrant, one whom he suspects of felony, must be such as would actuate a reasonable man, acting in good faith.

“The usual and necessary elements of the grounds of suspicion are, that the officer acts upon his belief that the person he is about to arrest is the one guilty of the felony, based either upon facts or circumstances within the officer’s own knowledge, or upon information imparted to him by reliable and creditable third persons.”

There is not any evidence in this record of any effort on the part of the officer to arrest decedent at any time. There is no evidence that so far as this officer is concerned at the time, that there was any felony for which he was about to, or intended to, arrest the decedent, and that would be sufficient to make this request very properly refused as asked for in accordance with the rules.

Again, this instruction was asked:

“At the time of making an arrest an officer has the right to search the prisoner and take from his person, and hold for the disposition of the trial court, any property connected with the offense charged or that may be used as evidence against him or that may give a clue to the commission of the crime, or the identification of the criminal or any person or implement that

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might enable the prisoner to commit an act of violence, or effect his escape."

Doubtless the law is applicable, but only in case of arrest, and there was no arrest of this man, or attempted arrest.

Third request:

"If John E. Rasey at the time he stopped Luigi Ciccolino, on the night of the shooting, in good faith believed Luigi Ciccolino had concealed on his person a gun or other concealed weapon, he, John E. Rasey, had a right, and it was his duty, to take such weapon or gun from him and to arrest him."

That statement leads to an investigation perhaps, of the duties and powers of a police officer, under the laws of Ohio, acting without a warrant.

Section 13492 of the General Code reads as follows:

"A sheriff, deputy sheriff, constable, marshal, deputy marshal, watchman or police officer, shall arrest and detain a person found violating a law of this state or an ordinance of a city or village, until a warrant can be obtained."

I would suggest here that this record fails to disclose any fact indicating that the deceased in this case was at the time of this occurrence violating any law of the state, or any ordinance of the city, in so far as there was any knowledge of this police officer.

Section 13493 reads:

"When a felony has been committed, any person without warrant may arrest another whom he has reasonable cause to believe guilty of the offense and detain him until a warrant can be obtained. If such warrant directs the removal of the accused to another county in which the offense was committed, the officer holding the warrant shall deliver the accused to a magistrate of such county to be dealt with according to law. The necessary expense of such removal and reasonable compensation for his time and trouble, shall be paid to such officer, out of the treasury of such county, upon the allowance of the county auditor."

The claim on the part of the officer with reference to any crime having been committed was, that the Chief of Police of the City of Ashtabula had telephoned him that somebody had com-

mitted some offense in the city of Buffalo in the state of New York, and that he might come in on certain trains that evening, coming in from the east, and to watch the heads of those trains for such person.

There is no evidence in this record anywhere that the deceased answered any description of this supposed fugitive, or that he did anything that night that indicated anything suspicious about him, or that he came from that train. The testimony is that he was peaceably passing westward along the Lake Shore Railroad tracks, until he came to the cross over the north and south railroad, with another companion, with his coat over his shoulder, and had reached within a few hundred yards of his own home, to which he was going, so that there seems to be nothing in this record that would bring the situation of these parties or this officer within any of the provisions of these statutes, and as they have been interpreted by our courts. It does not follow from this law that an officer may interrupt any one whom he sees passing peaceably along the ways of the city. There must have been such situation, such suspicious circumstances, such surrounding conditions that a reasonably prudent man might believe the person so passing to have been guilty of crime, that he would be authorized to detain him long enough to procure a warrant.

In the case of *Ballard v. State*, 43 O. S., 340, it is said in the opinion of the court on page 345:

“Under these circumstances, we think the officer was in the performance of official duty. This does not authorize such an arrest without a warrant on a mere venture, without knowledge or reliable information, though in fact, as afterward discovered, concealed weapons were found.”

See also *State v. Lewis*, 50 O. S., 179. In the case of *Britton v. Granger*, 7 C. D., 182, the third syllabus reads:

“To constitute a probable cause so as to warrant the arrest of a person for the commission of a crime, there must be such circumstances and surrounding facts as will lead a person of ordinary prudence to believe in the guilt of the person arrested, and if the facts show that to be the case, then there is probable cause for the arrest.”

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Now, that perhaps is sufficient to dispose of these requests. And now as to the charge of the court which is found on page 152 of the record, and on that page the court defines the rule of law as to self-defense. It was finally claimed on the part of the defendants below that this officer shot the deceased in self-defense, and we think the court very fairly gave the rule to the jury governing that feature of the case. The law that is given is as favorable to the defendants as they had a right to ask.

Now, it is insisted further that this verdict is against the evidence. I shall state in brief the situation of the parties. This deceased, Ciccolino, and another man by the name of Tuscano, were passing along the railroad tracks of the Lake Shore Railroad, going westward to their homes, there is no dispute about that. This officer overtook them and first stopped the companion of the deceased, and this is what he says occurred:

“I came to the first fellow. I don’t his name, and said, ‘What you got on you?’ He says, ‘Nothin.’ I put my hands over him and thought I felt something in his hip pocket and looked and found a razor in a box, and gave it back to him. Q. Then what did you do? I stepped by him and said to the other fellow, ‘What you got on you?’ Luigi Ciccolino says, ‘You no take my money?’ or something like that, and put his hand towards his hip pocket. I grabbed him by the shoulder, put my right hand on his shoulder, he had an overcoat thrown over his shoulder, I think, I don’t recollect how it was, and he commenced to resist—(Mr. Lawyer: Object. The Court: Tell what he did.) He tried to get away from me. I was satisfied that he had a gun on him or he wouldn’t resist. Q. Go ahead, tell what happened? He broke away from me, and I took my club and hit him on the left shoulder with it, his overcoat was on that shoulder, hit him on the left shoulder, and just then he drew a gun. Q. Where did he take the gun from? Hip pocket, I suppose, from the rear of his clothes somewhere. Q. After he broke away and pulled the gun, were you moving at that time? Not at that time. Q. What did you do? I jumped back, put my club up and pulled my gun from my overcoat pocket and hollered, ‘Drop that gun or I’ll shoot.’ Then he brought the gun up on me in about this position—(Mr. Lawyer, What position?) Not quite level and brought it up like this, and then I shot four times. Did you fire until he pulled his gun and started to level it? No, sir, he had levelled it when I commenced. Q. When he drew the gun how far would you say

you were apart? I should judge in the neighborhood of eight or ten feet, as near as I can recollect. Q. And about where at that time? Just a little east of the cross-over, going west. Q. Where was Carmine Tuscano at that time? I don't know, didn't see him after I searched him. Q. He wasn't around at the time of the shooting? No, sir. When you left him to search the other fellow, that was the last you saw of him? Yes, I think he went off. Do you know whether he ran or walked? Don't know. Then what happened? I fired four shots and he turned to the left and ran on until he fell down, ran I should think 150 feet, then I see some people in the tower and went over there and asked if there was a telephone there, and they said there was a Bell."

And then he telephoned to the chief of police.

Again, to show what occurred by his testimony:

"Q. You seem to be able to remember some things quite well. What did you say when you turned after searching that man Tuscano? I can't remember exactly. Q. Now, how far was this other man, Ciccolino, standing from you when you searched Tuscano? Well, he stood on the left side of him, on my right, stood about two or three feet from him. Q. While you were searching the other man Ciccolino make no attempt to do anything, did he stand right there? No, sir. Q. Ain't that true that all the time you were searching this man, that Ciccolino stood right there where he was in the first place and never tried to get away? No, sir. Q. Well, what did he do while you were searching Tuscano? Ciccolino started off. Q. Started which way? Towards the west across the Lake Shore. Q. How far had he got before you said anything to him? Oh, just a few steps off. Q. A few steps, how many? About six or eight. Q. How far? Well, four feet I should think * * *" and so on.

"Q. When you hollered to him to hold on a minute, did he stop? Yes, sir. Q. Tell what occurred, what was done or said? I came up to him to search him. Q. Didn't you say to him 'What have you got?' You said that to him, didn't you? I don't know. Can't remember that now. Q. And he said 'You can't take my money?' Yes sir."

This is *his* statement of what occurred.

The other witness who was there part of the time, testified quite differently,—that before any proceedings had taken place, that the police officer struck the deceased over the side of the

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head with his club, and there was evidence of a scar on the side of his head. as testified to by people who examined the body afterwards. And testimony of other disinterested witnesses was that these four shots did not all come at one time; that two of them took place one right after the other then a short interval, then the other two. This man was hit twice, once in the abdomen and the other in the leg.

But, was the officer justified by his own statement in what he did at that time—and is it necessary in order that we may have police protection that we justify such proceedings on the part of a police officer?

This deceased, as the testimony shows, was foreman on the tracks of the Lake Shore Railroad, and had lived there a number of years. As I have stated, these two persons were peaceably passing along the railroad track on the way to their homes, no pretense that they were violating any law; there is no pretense on the part of the police officer in his testimony that he thought either of them had been violating the law, but he had a suspicion that each of them might be carrying a concealed weapon, and he searched the first one and then attempted to search the other, and because the other man perhaps, did not yield gracefully to a search by a policeman who may meet him anywhere, he raps him over the head. The officer claims he struck him on the shoulder but there doesn't seem to be any reason for either blow, the one which he admits having given, or the other which the testimony shows, and the jury might well find, was given.

And he says the other man pulled out a gun, thereupon he told him to put it up, and without waiting for him to do so he shot four times, and that he was eight or ten feet away, he says. He was not, as I have stated, in this testimony, in any way attempting to arrest this man. Neither is there any statement on his part that he did arrest him, or that he desired to put him under arrest. If he had wanted to escape this gun he could have very easily done so. He simply wanted to search him. There is no evidence that he found anything about him to indicate that he was this person from Buffalo he was hunting.

The other man, Tuscano, says that this man did not pull any revolver out. The testimony shows that he had a revolver but

that it was carried in the inside pocket of his coat, and it was found under his body after he was shot. The jury could well find that he did not even take out his gun. And the jury was abundantly justified in so finding.

We think this officer largely exceeded any authority he had as a policeman of the city of Ashtabula, and that the jury were justified in finding that he wrongfully, acting as a policeman, caused the death of this decedent, and that there is no error in the record, and the judgment is affirmed.

LIMITATION UPON A DEVISE HELD VOID.

Court of Appeals for Licking County.

LAURA ROBRAHAM ET AL V. ALLEN B. GREGG ET AL.

Decided, 1913.

Wills—Devise of Land With a Limitation Over—Nature of the Title Taken by the Devisee.

Where land is devised generally by G. to H, without qualification or condition except the proviso that, in the event H does not sell said land during his lifetime or make disposition thereof in his last will, the said land shall go to and become the property of persons named, the devise over is void, and in an action to set aside the will of H, it is not error to sustain an objection to testimony of the said secondary devisees on the ground that they are not persons having an interest in the will of H.

Carl Norpell and Kile & Kirkpatrick, for plaintiff in error.
Fitzgibbon & Montgomery, contra.

POWELL, J.; SHIELDS, J., concurs; VOORHEES, J., not sitting.

The plaintiffs in error. Laura Robraham, Sloan Campbell, Margery Johnston, Erma Crawford, Margaret A. Hill and Lois B. Ingalls file a petition in error in this court, by which they seek to reverse the judgment of the court of common pleas, in an action brought in that court to set aside the will of one Ensley Finney Haas, deceased.

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These plaintiffs in error were, by leave of the court, made parties defendant to a proceeding brought by the heirs at law of the said Ensley Finney Haas, deceased, to set aside what purported to be his last will and testament, which had been admitted to probate and record in the Probate Court of Licking County before that time.

By the will of Martha Goff, who was a sister of the said decedent, Ensley Finney Haas, he became the owner of the east half of a tract of land consisting of 135 acres, more or less, in Licking county, and which was described in the will of said Martha Goff, deceased. The plaintiffs in error claim to be the owners of this tract of land, which was devised by the said Martha Goff to Ensley Finney Haas, by virtue of the provisions of her will, in the event that the said Ensley Finney Haas did not sell, or otherwise dispose of said real estate during his lifetime, or by his last will and testament.

By item 2 of the will of said Martha Goff, an estate in fee simple was devised to the said Ensley Finney Haas. It was further provided in said item 2 of said will "that in the event that said Ensley Finney Haas does not sell or otherwise dispose of said east half during his life, or by his last will and testament, said east half of said property"—the said 135 acres—"shall go to and be the property absolutely of Margaret A. Hill, Margery Johnston, Eliza Dunlap, Addie Dunlap, Lois B. Ingalls, Laura Robraham, Sloan Campbell, Erma Crawford and Harriett Hughes; that is, that said property shall be owned by said named persons, or those of the same who are living at the time of my said brother's death."

The plaintiffs in error claim that, because of incapacity and undue influence, the paper-writing, which was admitted to probate and record as the last will and testament of the said Ensley Finney Haas, was not his will; and on the trial of said cause in the court of common pleas they endeavored to show, by testimony, that the same was not his will; that he was without capacity to make a will at the time when said purported will was executed, and that, by reason of undue influence on the part of the defendants, such paper-writing was not his will; that they being named as secondary devisees of said real estate in the will of

Martha Goff in the event that said Haas did not dispose of the same, they became the owners of said real estate upon his death; and they seek a decree of the court setting aside said will.

Their right to offer testimony on the trial of said cause was objected to on the part of the various devisees named in the will of said Ensley Finney Haas, on the ground that these secondary devisees, now plaintiffs in error, had no interest in the estate of the said Ensley Finney Haas, deceased, and that the devise over, in the second item of the will of Martha Goff, was void; that they were strangers to his estate, and without authority to contest the validity of his will.

Their right to maintain said action depends upon the construction to be given to the second item of the will of said Martha Goff. There is no dispute among counsel or claim that the second item of the will of Martha Goff does not give an absolute estate in fee simple to the land described in said item to said Ensley Finney Haas: and it is not claimed but that, by the terms of said will, he had full power of disposition and could sell and convey, or could devise by last will and testament, the land so devised to him; and only in the event that he failed to exercise his power to convey by deed or by will, could the plaintiff in error become seized of any interest in said lands.

A large number of authorities have been cited as to the proper construction to be given to this item of the will of Martha Goff. If plaintiffs have any interest whatever under said will, they were entitled, by reason of such interest, to contest the validity of the will of said Ensley Finney Haas, and to have the same set aside in case a proper showing for that purpose had been made. If they do not take any interest under the will of Martha Goff, then the action of the court below, in refusing to hear testimony offered by them, was correct.

Upon an examination of all the authorities cited by counsel for both plaintiffs in error and defendants in error, the court has arrived at the conclusion that the plaintiffs in error have no interest in said lands derived through the will of the said Martha Goff, deceased; that the title to said lands passed by said will absolutely and in fee simple to the said Ensley Finney Haas, and that the devise over, in the event that he died without having disposed of said real estate by deed or will, is void.

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It is said to be a general rule that, when an estate is given to a person generally, with a power of disposition, it carries with it the fee; and the only exception to the rule is when the testator gives to the first taker an estate for life only by certain and express words, and annexes to it a power of disposition. There can be no question but that the estate conveyed by the second item of the will of Martha Goff to the said Ensley Finney Haas was an absolute estate in fee simple, with full power of disposition; and that the limitation over, in case he did not dispose of it by will or otherwise in his lifetime, is void. *Finley Brewing Co. v. Henry Dick et al*, 13 O. D., 581, the syllabus of which case is: "If real estate is devised to A generally, without any qualification or condition, but with a proviso that in case of his death without will, the property shall go to B, the limitation over is void, and A takes the entire estate in fee simple, unaffected by the proviso." This case was affirmed by the Circuit Court of Lucas County, without report.

We think this rule of law is controlling in the case at bar; that the provision in the will of the said Martha Goff, deceased, under which the plaintiffs in error claim title, is void and of no effect; and that because said plaintiffs in error have no interest or title in and to the estate of the said Ensley Finney Haas except under this void provision, they are without right or authority to contest his will. The persons who are authorized by statute to maintain a contest of the will of any deceased person are named and specified in Section 12079 of the General Code. The Supreme Court, in construing Section 5858 and Section 5859 of the Revised Statutes, say:

"Any person who has such a direct, immediate and legally ascertained pecuniary interest in the devolution of the testator's estate as would be impaired or defeated by the probate of the will, or be benefitted by setting aside the will, is 'a person interested,' " and only "a person interested" can maintain a suit to set aside a will. 78 O. S., 46.

It follows that the judgment of the court of common pleas, in refusing to permit plaintiffs in error to introduce testimony because of their want of interest in the estate of the said decedent, was correct, and that the judgment of said court should be affirmed.

**DEGREE OF CARE REQUIRED IN OPERATING A PASSENGER
ELEVATOR.**

Circuit Court of Cuyahoga County.

CHARLES F. SCHABER, EXECUTOR OF THE WILL OF JOHN SCHABER,
DECEASED, v. BENJAMIN F. YOUNG.

Decided, March 24, 1911.

Elevator Accident—Duty of Owner and Operator—Who is Passenger.

1. In an action for damages for injuries received by a passenger through the alleged negligence of an owner and operator of an elevator, it is not error to charge that the same degree of care is required of such owner and operator as of a common carrier of passengers, it being explained that the care so required is of the highest degree.
2. The owner and operator of an elevator, like the common carrier of passengers, is not bound to use the highest degree of care for all who come to its stations, yet, when it holds out the invitation to "step aboard," its duty to afford the highest degree of care to him who accepts the invitation, and undertakes to step abroad, has begun.

Howland, Moffet & Niman, for plaintiff in error.

E. J. Pinney and Herman J. Nord, contra.

MARVIN, J.; WINCH, J., and HENRY, J., concur.

Benjamin F. Young brought suit against John Schaber.

Before the case was tried John Schaber died, and by order of the court the action was revived in the name of the present plaintiff in error, as defendant.

Trial was had to a jury, and plaintiff recovered.

The cause stated in the petition is that defendant owned an apartment house in the city of Cleveland the rooms and suites of which were rented out to various tenants. Plaintiff was a tenant of defendant in said building, occupying rooms on the fourth floor. Said apartment house was provided with a passenger elevator, operated by defendant and his servants, to convey tenants and those having business with them, up and down between the several floors of the building.

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On the 21st of September, 1905, late in the afternoon, the plaintiff stepped through the doorway of said elevator into the elevator shaft, on the ground floor, and the elevator not being there, the doorway being unobstructed by any door guard or warning, and fell a considerable distance, and was severely injured.

He says in his petition that he was without fault, and that his injuries were caused wholly by the negligence of the defendant in not properly performing his duties in respect to such elevator, specifying the items of negligence.

The defendant denies, in his answer, that plaintiff was injured, but says if he was, his own negligence contributed to his injury. The result of the trial was a verdict and judgment for plaintiff below in the sum of \$4,500.

By this proceeding in error, it is sought to reverse said judgment.

That the jury might well have found that the original defendant was negligent and that the plaintiff was not negligent we think is shown by the evidence. We do not mean that there may not be some doubt about one or both of these propositions; but that the jury might so find as to both, without finding against the manifest weight of the evidence.

The first claim urged by plaintiff in error in his brief is that excessive damages were allowed. We are not prepared to say that the amount of the verdict is such as to show passion or prejudice on the part of the jury. Within reasonable limits, the jury may fix such damages as to them seem the proper compensation for the injuries received.

Plaintiff was 64 years of age; was a shoemaker by trade and could earn \$650 to \$700 per year. There is evidence tending to show that his injuries are permanent and have practically destroyed his earning capacity. There was no evidence offered as to his expectancy of life or of continuance of earning capacity. He suffered much pain, and was put to expense for treatment on account of his injuries. No one can say in such a case just what is reasonable compensation, and though all reasonable men might say that a named amount is unreasonably high, or another named amount is unreasonably low, yet it can not be

doubted that reasonable men might vary considerably in the amount which ought to be allowed in a case like the present.

We do not feel justified in reversing the judgment for excessive damages.

Complaint is made that the court erred in its charge to the jury by the use of these words:

“It has been decided by our courts that an elevator owner and operator of an elevator stands in the same relation as a common carrier of passengers.”

This fairly construed with the facts in the case and the charge generally, meant, and must have been understood by the jury to mean, that the elevator owner, or manager, owed the same duty to elevator passengers that is owed generally by common carriers of passengers to those whom they undertake to carry.

The court follows the words above quoted with a correct statement of what duty common carriers of passengers owe to such passengers.

The language used was in accordance with the holding of this court in the case of *The Cobb-Bradley Realty Co. v. Hare*, in an opinion announced by Judge Hale in February, 1903, and is in accordance with a large number of cases, cited by and quoted from in the brief of defendant in error.

In *Mitchell v. Marker*, 25 L. R. A., 35, Judge Lurton said:

“We see no distinction in principle between the degree of care required from a carrier of passengers horizontally, by means of railway cars or stage coaches, and one who carries them vertically by means of a passenger elevator. The degree of care required from carriers by railway or stage coach is the highest degree.

“Neither is an insurer, but in regard to each, care short of the highest degree, becomes, not ordinary care, but absolute negligence.”

To the same effect are the following: *Shellenberger v. Fisher*, 143 Federal, 937; *Fox v. City of Philadelphia*, 208 Pa. St., 128; *Goodsell v. Taylor*, 41 Minn., 207.

There was no error in this part of the charge.

Counsel for plaintiff in error uses this language in his brief:

“We contend that it was erroneous for the trial court to state as a fact, that our courts have already decided a certain propo-

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sition of law, when the question has not been passed upon by our courts here, so far as the reported cases disclose.”

In using this language counsel overlook the fact that the jury were bound to take the law from the court as he gave it, and that they would be no more, and no less, bound so to take it, whether the court was, or was not supported by authority of any other court or of any text book.

It is urged, however, that the rule as to care due to passengers, whatever that care is, does not begin until one actually becomes a passenger by getting into the car or other vehicle in which he is to be carried, and that therefore this duty never arose in favor of the plaintiff below, because he never got into the elevator.

We think the position is not sound when applied to the facts of this case.

The only reason the plaintiff was not a passenger in the car, was, that when he stepped there, if the elevator platform was where the open door indicated that it was, he would have been in the elevator. The platform not being there was what caused him to fall. And though the carrier is not bound to use the highest degree of care for all who come to its stations, yet when it holds out the invitation to “step aboard” its duty to afford the highest degree of care to him who accepts the invitation, and undertakes to step aboard, has begun. If one were to take hold of the handle or rail provided to be taken hold of by him who is to take passage in a car, and that handle was so defective that it gave way without any unusual strain upon it, by reason of its rottenness or broken condition, the party seeking to board the train would have all the rights of the passenger.

Complaint is made of the court’s definition of proximate cause. What the court said was, “By the proximate cause of the injury I mean that cause, which caused the injury. but for which the injury would not have occurred.”

This language, taken in connection with what was said on the effect of contributory negligence, was neither erroneous nor misleading.

There is no error in the charge, nor in any part of the proceedings which would justify a reversal and the judgment is affirmed.

**EXTRAVAGANT REPRESENTATIONS AS TO THE MERITS OF
AN ICE CREAM FREEZER.**

Circuit Court of Cuyahoga County.

H. B. PUMPHREY v. C. H. HAFFNER, MAGGIE A. HAFFNER AND
FRANCES H. PALMER.

Decided, May 15, 1911.

Sale of Patent Rights—Covenant as to Ownership—Made Good by Repurchase of Outstanding Interest—Applications for Patent a "Patent Right"—Immaterial and Material False Representations.

1. It is immaterial if one contract to sell a one-half interest in certain dies and patent rights, covenanting that he is the sole owner of all interests therein, whereas in fact he had previously sold a one-half interest, provided that he obtains a reconveyance thereof at or about the time he makes such covenant.
2. One who has applied for a patent upon an invention of which he is the owner, while his application is pending and before it is issued may declare that he is the owner of "patent rights" and sell an interest therein.
3. Representations that an ice cream freezer is the best ever; that whoever saw it would want it; that hardware dealers would take it as soon as they saw it; that his price for a half interest in the invention would be much higher to any one else than the plaintiff, but that owing to the plaintiff's especial adaptability to exploit an ice cream freezer, he would let him in cheap, etc., made in order to induce the plaintiff to purchase an interest in the invention, and upon which he acts, are a kind of bragging and flattery, but though false, do not constitute that kind of fraud which is recognized by the law.
4. Representations that an ice cream freezer is selling well; that it is giving excellent satisfaction and is doing the work intended in a perfectly satisfactory manner are material and if relied upon in purchasing an interest in the invention, and turn out false, will give ground for setting aside the sale.

D. M. Bader, for plaintiff.

H. A. Tilden, contra.

MARVIN, J.; WINCH, J., and HENRY, J., concur.

H. B. Pumphrey prays to have a deed of conveyance of certain real estate, made by him to Maggie A. Haffner, who is the wife

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of C. H. Haffner, set aside; also to have a deed of a part of the same real estate made by C. H. Haffner and Maggie A. Haffner to Frances H. Palmer set aside.

Without going into the reasons why, it is agreed that both of these deeds should be set aside, if the contract made between Pumphrey and C. H. Haffner, under which the deed to Maggie A. Haffner was made, would not support the deed last named if it had been made to C. H. Haffner instead of to Maggie A. Haffner.

The plaintiff says this contract was tainted with fraud perpetrated on him by C. H. Haffner.

This contract was made May 24th, 1910. If there was fraud on the part of Haffner in the transaction, it was in reference to certain representations made by him to Pumphrey in regard to certain rights in a patent on ice cream freezers. In a writing given to Pumphrey by Haffner on the day last named, Haffner declared that he was the sole owner of all interests in certain dies and patent rights in the "Reams-Haffner Instantaneous Freezer," and one-half interest in these patent rights and dies was what he gave to Pumphrey for the real estate in question.

The evidence shows that, before the date of this contract, Haffner had sold a half interest in this same thing to a certain corporation, with which he was connected, and on the part of Pumphrey, the evidence tends to show that this title was outstanding at the date of the contract with Pumphrey. On the part of Haffner, it was asked that the case be delayed for evidence which it was said could and would be produced, that the interest which this corporation had received from Haffner had been transferred back to him before the 24th day of May, 1910. It was conceded by the plaintiff that such reconveyance was made at some time, either before or after May 24th, 1910, and holding that it would in no wise matter to Pumphrey whether such reconveyance was made before or after the date named, we did not wait for the evidence, but hold that Pumphrey would not be entitled to relief simply because of this transaction with the corporation, so long as Haffner got the title in, and so made good the title in Pumphrey.

As a matter of fact, no letters patent have ever been issued on the device spoken of, but application for such patent had been made, and this application was pending in the patent office at the time of the contract, and such application was owned by Haffner, so that he had certain rights in the patent, which may be called "patent rights" even without letters patent having been issued.

The evidence is not clear as to whether Pumphrey knew exactly the situation of the patent in the patent office or not, when the contract was made. If he did not, he learned shortly after the date of the contract, and did not seek then to avoid the contract on that account. Many representations are charged by Pumphrey to have been made by Haffner, which, whether strictly true or not, would not avoid the contract. Haffner said, in effect, that the freezer was the best ever, that whoever saw it would want it, that hardware dealers would take it as soon as they saw it, and that to any other man than Pumphrey his price for the half interest would be \$10,000 but that owing to his especial adaptability to exploit an ice cream freezer, he would let him in cheap, etc.

This kind of bragging and flattery does not constitute the kind of fraud recognized by the law. These representations only purported to be Haffner's opinions as to the great value of the invention, and very likely may have been entertained by him. Many an enthusiastic inventor has entertained such opinions relative to his invention, only to have them shattered by the indifference with which his device was received by the public, or by its utter rejection.

But the evidence does show that Haffner made statements to Pumphrey which the existing facts did not warrant, which were material and were relied upon by Pumphrey. He told him the machines were selling well; that they were giving excellent satisfaction, and were doing the work intended in a perfectly satisfactory manner.

The fact was, that the machines sold up to that time, as well as since, were wholly unsatisfactory, and had failed to show that there was any value in the patent, either as it then was, inchoate, or as it might become, if letters were issued. Haffner substantial-

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ly admits that the machines had not done good work, but says it was because of faulty construction. Possibly the whole difficulty was on account of faulty construction, but the difficulty is that Haffner represented to Pumphrey that the machine already sold demonstrated the value of the invention, and on this Pumphrey relied. Haffner so far overstated the fact as to constitute a fraud, by reason of which the plaintiff is entitled to a decree setting aside the deeds, as prayed for, and such decree will be entered.

CONVICTION UNDER AN INVALID ORDINANCE.

Circuit Court of Cuyahoga County.

W. C. GATES v. THE CITY OF CLEVELAND.

Decided, June 2, 1911.

Police Court—Judicial Notice of Ordinance of Municipality—Reviewing Courts Can Not Take Judicial Notice of Ordinances—Exposing Turnips for Sale in Unsealed Receptacle, Not an Offense.

1. The police court of a municipal corporation may take judicial notice of its ordinances, but the common pleas and circuit court may not do so.
2. Upon conviction in a police court for violation of a municipal ordinance of which that court took judicial notice, the bill of exceptions failing to show the terms of the ordinance, the higher courts will assume the existence of a valid ordinance authorizing the conviction, if the offense charged in the affidavit is one as to which the municipality has power to legislate.
3. Municipal corporations are not vested with power to make it an offense "to expose for sale turnips in a receptacle not tested, marked and sealed by the city sealer," and a conviction by a police court on such a charge will be set aside.

E. J. Pinney and G. W. Rosenberg, for plaintiff in error.
N. D. Baker, contra.

MARVIN, J.; WINCH, J., and HENRY, J., concur.

An affidavit was filed in the police court of the city of Cleveland, charging that in the city of Cleveland, on January 3d, 1911,

W. C. Gates “exposed for sale turnips in a receptacle not tested, marked and sealed by the city sealer, contrary to an ordinance of said city.” Thereupon Gates was arrested, tried and convicted. On error prosecuted by him in the court of common pleas, this conviction was affirmed. We are asked to reverse this affirmance and the original judgment of conviction. The ground of reversal urged is that the ordinance under which the conviction was had is invalid.

This court, as we have held in several cases, can not take judicial notice of municipal ordinances. hence, since the bill of exceptions does not contain the ordinance, we can not know how it reads; and this was true also of the court of common pleas. If it be said that, since the police court takes judicial notice of ordinances, there would, of course, be no question for its introduction as evidence on a trial in that court, and hence it could not properly be contained in the bill of exceptions taken from the court.

We have pointed out in other cases that the police court could have made a copy of the ordinance a part of the bill, certifying that the prosecution was had under such ordinance. By this means the reviewing court has the ordinance before it for consideration.

However, the defendant in error, the city, loses nothing by the absence of the ordinance, because, as we have held in other cases, we must presume, in the absence of the ordinance, that the police court did not err in the application of it, and that the ordinance is valid, unless the city was without authority to pass a valid ordinance which would make it an offense to do that which the affidavit here charges Gates with doing.

So we have directly presented the question: Has a municipality authority under the statutes of the state to make it an offense to “expose for sale turnips in a receptacle not tested, marked and sealed by the city sealer?”

The claim on the part of the city is that it has such authority under Section 3651, General Code, which is a section in Chapter 1, Division 2, Title 12, on municipal corporations. This entire chapter is on the enumeration of powers. This section authorizes municipal corporations, by ordinances, “to regulate the

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weighing and measuring of hay, wood, and coal and other articles exposed for sale. and to provide for the seizure, forfeiture and destruction of weights and measures, implements and appliances for measuring and weighing, which are imperfect, or liable to indicate false or inadequate weight or measure," etc.

To us this statute falls far short of authorizing the municipality to make it an offense to "expose for sale" articles that are not in any measuring receptacle or on any weighing device.

If the city could, by ordinance, make it a punishable offense to do what Gates is charged with doing, then if he brought beans in an ordinary barrel, took them to the market house, and there exposed them for sale in such quantities as purchasers might desire to buy, having at hand a measure in exact conformity with the standard fixed by law, and which measure had been properly tested, marked and sealed by the city sealer, in which he properly measured every quantity sold, still he would have committed exactly the offense which Gates is charged with.

Every word in this affidavit may be true, and yet, it may be that Gates had his turnips in his wagon box, or in barrels, or in bags, not using any of them as means of measuring them, but only as a convenient way of bringing them to the city, or to the market house, or about the city, as a huckster, from house to house, having and using at every sale the properly tested and sealed measure.

It is possible that if the charge was that he had exposed these turnips for sale in a receptacle purporting to be, or used by him as a measure, for such turnips, we might reach the conclusion that the city could, by ordinance, make that an offense, under the authority of the statute; but we are clearly of the opinion that the Legislature of the state has not conferred upon the city the authority to make that an offense which is charged in this affidavit against Gates.

It follows that the judgment of both the court of common pleas and of the police court must be reversed.

ACTION FOR FAILURE TO PERFORM A CONTRACT.

Circuit Court of Cuyahoga County.

ELITA E. PECK V. ELIZABETH D. OSBORN.

Decided, June 2, 1911.

*Former Adjudication—Dismissal of Petition for Specific Performance
No Bar to Action for Damages.*

A judgment of dismissal of a petition for the specific performance of a contract for the sale of lands is no bar to an action for damages for failure to perform said contract.

Parsons & Fitzgerald, for plaintiff in error.*Ong, Thayer & Mansfield*, contra.

MARVIN, J.; WINCH, J., and HENRY, J., concur.

Elita E. Peck was plaintiff below, and sued Elizabeth D. Osborn for damages for failure to perform a contract for the sale of certain real estate. The defendant set up that the same plaintiff had sued the same defendant in the same court, praying for specific performance of this same contract and that the court had held against her, refusing to decree specific performance, and dismissing her petition. On demurrer in the present case, the court sustained said defense and dismissed the petition, entering judgment for the defendant.

The only question before us is as to whether or not the plaintiff here is barred by the adjudication in the former case.

Our attention is called to many cases, by counsel on both sides of this case, the contention of the defendant in error being that the rights of both parties, in all matters growing out of this contract, were either determined or might have been determined, in the former action. In support of this, among other authorities cited, is the case of *Strangward v. The American Brass Bedstead Co.*, 82 O. S., 121, the second paragraph of the syllabus of which reads:

“When a matter has been finally determined in an action between the same parties by a competent tribunal, the judgment is

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conclusive, not only as to what was determined, but also as to every other question which might properly have been litigated in the case.”

Also *Grant v. Ramsey*, 7 O. S., 157, in which it is held that where a question of fact has once been tried and adjudicated by a court of competent jurisdiction, it can not be reopened in a subsequent suit between the same parties. They are concluded by the former judgment.

It can not be claimed, at least it ought not to be claimed here, that all the questions which may arise in this case bearing on the plaintiff's right to damages, were necessarily disposed of in the former case, because in that case the court may have adjudicated as it did, because it found, in the exercise of its discretion, that it would be inequitable to decree specific performance, and so that relief was refused, and the plaintiff left to her remedy at law, as in many of the cases it is said.

It can not well be claimed either, that as the pleadings stood in that case, the right of the plaintiff to damages could have been tried. The pleadings called for the exercise of the equitable jurisdiction of the court only. Because of this, the case was appealable, and was appealed to this court, and it was in this court that the final judgment was made of dismissal of the plaintiff's petition. Could this court have directed or allowed pleadings to be amended so as to make a case for damages, and then proceed on this appeal to try the question of damages?

We regard the case of *Porter v. Wagner*, 36 O. S., 471, as decisive of this case. The first paragraph of the syllabus in that case reads:

“A judgment of dismissal of a petition for the specific performance of an agreement, and of a counter-claim asking a rescission of the same, is no bar to an action for the recovery of money paid on the agreement, although the cause of action accrued before the rendition of the judgment.”

We reach the conclusion, therefore, that the judgment of the common pleas court must be reversed, and the cause remanded,

**VALIDITY OF THE ELECTRIC RAILWAY STREET
CROSSINGS ACT.**

Circuit Court of Cuyahoga County.

VILLAGE OF ROCKY RIVER, v. THE LAKE SHORE ELECTRIC RAILWAY
COMPANY.

Decided, June 2, 1911.

Constitutional Law—Section 9118, General Code, Constitutional.

Section 9118, General Code, which provides that the court of common pleas shall have jurisdiction to fix the manner and mode of crossing streets in a municipality by electric street railroads and the compensation, if any, to be paid therefor, is constitutional.

D. F. Miller, for plaintiff in error.

W. B. & H. H. Johnson, contra.

MARVIN, J.; WINCH, J., and HENRY, J., concur.

A question in this case is made by the defendant in error, that by reason of the entry made in the court below, the case is not reviewable on error. The language of the entry is as follows:

“By consent of the parties herein, it is ordered, adjudged and decreed that the certain manner and mode of effecting the crossings of said Blount street and said Wooster road in the village of Rocky River, with the tracks of said defendant herein as indicated in a certain map or plat attached to the amended answer of defendant herein and marked ‘Exhibit A’ thereto, is a proper and reasonable manner of effecting said crossings, and it is further ordered, adjudged and decreed that said plaintiff shall lay or cause to be laid,” etc.

There is a peculiarity about the record in this case, to which attention was not called at the hearing, which is, that, though a motion for new trial was filed by the village of Rocky River on the 28th day of November, 1910, it was never disposed of. The petition in error was filed in this court on the 23d of March, 1911. Thereafter, on the 6th of April, 1911, leave was given in the court of common pleas to the village to file an amended answer of November 25th, 1910, and on the same day the motion

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of the village for a new trial was withdrawn. These proceedings of April 6th, 1911, appear by an additional transcript filed here, or at least found in the file wrapper here, but without any mark of filing upon it.

As we view the case, however, it is not necessary to say what effect the entering of judgment by consent of the defendant below or the withdrawal of the motion for new trial, or the fact that such motion was not passed upon by the court before proceedings in error were instituted, would have, because we find no error in the case which would justify its reversal in any event.

The action below, brought by the railroad company under Section 9118, General Code (101 Ohio Laws, 375), was that the court of common pleas might determine the mode and manner of crossing the streets named, in the village, with the tracks of the railroad, and the compensation to be paid therefor. The proceedings were in exact conformity with the provisions of the statutes, and the only claim of error is that the statute is unconstitutional. There is nothing said in the statute as to a jury to assess the damages, the language being:

“The court of common pleas, thereupon, shall have jurisdiction of the parties and of the subject-matter of the petition, and may proceed to examine the matter offered by the evidence, by reference to a master commissioner, or otherwise, and upon the final hearing of said cause, the court shall enter its decree fixing the manner and mode of such crossing and the compensation, if any, to be paid therefor.”

Whether, under this provision, the parties would have the right to have the damages assessed by a jury, we do not need to determine here. For if this can not be done under the statute, still the statute does not come under Article I, Section 19, of the Constitution, which provides that where *private* property is taken for public use, damages shall be assessed by a jury. The streets in which the company seeks to acquire rights in this proceeding are not private property, but have already become public property by being streets of a municipality, and what is sought is to subject this public property to an additional public use. The case of *Zanesville v. Tel. & Tel. Cos.*, 64 O. S., 67, seems directly in point. We reach the conclusion that the judgment below should be affirmed.

**FEES TO ATTORNEYS PAYABLE ONLY OUT OF
SPECIFIC FUND.**

Circuit Court of Cuyahoga County.

CHARLOTTE M. PHILLIPS V. THE TRAVELERS INSURANCE COMPANY
OF HARTFORD, CONN., ET AL.

Decided, June 2, 1911.

*Attorney's Fees—Allowed Only for Services in Case in Which Fund
Recovered.*

Attorneys fees for services rendered in one case, may not be ordered
paid out of funds recovered in another case, or for any services
rendered, except in the case in which the fund was recovered.

J. J. Sullivan, for plaintiff in error.

*Hoyt, Dustin, Kelley, McKeehan & Andrews, Carr, Stearns
& Chamberlain, E. J. Pinney and White & Crosser*, contra.

MARVIN, J.; WINCH, J., and HENRY, J., concur.

The question involved in this case arises on an amended answer and cross-petition filed here by W. B. Neff and C. W. Dille, and a demurrer filed thereto.

We fail to see how the facts therein stated entitle these parties to a lien upon the money now in the hands of the court or a decree declaring an equitable assignment of any part of the funds. We find no case in Ohio directly in point.

In *Diehl v. Friester*, 37 O. S., 473, the matter is discussed at page 477 and it would appear that cases may arise and do arise where the court orders payment of fees to attorneys out of funds under its control, but in no case, so far as we know, has it been held that the court may order fees to be paid out of funds recovered in one case, for services rendered in another case, or for any services rendered except in the case in which the money was recovered.

There is nothing set up in the pleading of these defendants that seems to require any equitable interference; there seems to be no reason why these parties should not be put to their

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remedy at law, allowing Mrs. Phillips to have the verdict of a jury as to what amount she owes them, and from their pleadings it would appear that she clearly owes them something, and from aught that appears, she is able to pay whatever may be adjudged against her in an action brought for such fees.

The discussion of the question of the liens of attorneys found in Chapter 5 of *Jones on Liens*, is instructive, and seems directly against the claim of these defendants.

See also *DeWinter v. Thomas*, 27 L. R. A., (N. S.), 634, and notes of cases there cited.

Demurrer sustained.

AS TO CORRECTION OF RECORD BEFORE JUSTICE OF THE PEACE.

Circuit Court of Cuyahoga County.

WILLIAM FOUNTAIN V. THE J. T. WANELINK & SONS PIANO
COMPANY.

Decided, November 13, 1911.

Justice of the Peace—Motion to Correct Date of Judgment—Bill of Exceptions—Review on Error.

It is error for the common pleas court to reverse on error proceedings from a justice of the peace, the order of the justice overruling a motion to correct his record so as to show the actual date on which he entered judgment in the case, there being no bill of exceptions from the justice showing all the evidence given and offered on the hearing of said motion before him and no provision of law for the perfecting of a bill of exceptions in such matters.

Charles R. Summers, for plaintiff in error.

Parsons & Fitzgerald, contra.

MARVIN, J.; WINCH, J., and HENRY, J., concur.

An action was brought before a justice of the peace by the plaintiff in error against the defendant in error. The result of the trial of such action was a judgment in favor of the plaintiff. That judgment was entered on the docket of the justice under

date of July 6, 1909. On the 5th day of August, 1909, a motion was filed by the defendant before said justice in these words, "The defendant moves the court for an order in the above entitled case to correct the record so as to show the actual date on which judgment was entered in said case, to-wit, on a day subsequent to July 6, 1909;" and on the same day this motion was overruled. To the order of the justice overruling this motion, error was prosecuted in the court of common pleas, the result of which was that the last named court reversed the order of the justice in overruling said motion, and it is to reverse this judgment of reversal that the present proceeding is prosecuted.

The situation is somewhat peculiar. There is no suggestion in the motion made before the justice of any particular day or definite date on which this judgment, which was entered as of July 6th, should have been entered, but only that such should be entered on a date subsequent to July 6th. Unless the court of common pleas had evidence properly before it to show that the justice should have entered this judgment at a date subsequent to that on which his records show that he did enter it, there was error on the part of the court of common pleas in reversing this judgment. We hold there was no such evidence.

There appeared among the papers in the case certain affidavits in reference to the entry of this judgment. It is probable, though perhaps it is not at all certain from anything that appears, that these affidavits were used on the hearing of the motion before the justice. There is no mark of their being filed with the justice; but treating them here as though they were on file with the justice, and that they properly came into the court of common pleas as a part of the original papers in the case, they still did not furnish such evidence as authorized the common pleas court to reverse the judgment below, and this for the reason that whatever is contained in those affidavits, even though it was properly before the common pleas court for consideration, may have been, for all that appears, but a part of the evidence on which the justice acted. There is nothing in his transcript to show upon what evidence he acted. The court of common pleas was not authorized to reverse upon the facts, without all

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the evidence upon which the justice acted being brought before the common pleas court; and, as already said, there is nothing in the record to show that this was done.

But it is said that there is no provision of statute for bringing up by bill of exceptions, the evidence upon which a justice of the peace acts, in a matter of this kind. This difficulty is recognized in the case of *Baer, Harkeimer & Co. v. Otto*, 34 O. S., 11. On page 15, it is said in the opinion in this case:

“In order to settle the practice in such cases, we now decide that there is no provisions in such cases made by legislation, as it now stands, for preserving the evidence offered on such motion, or for reviewing the decision of the justice upon the grounds that such order either in granting or refusing the motion is contrary to the evidence.”

The matter under consideration was a motion to discharge an attachment by the justice of the peace. The difficulty, however, and injustice, if it is an injustice or failure of the statute to work out complete justice, seems to exist in such a case as we have before us as existed in the case under consideration by the Supreme Court when the language quoted was used.

To relieve from the difficulty presented by the decision in *Baer, Harkeimer & Co. v. Otto, supra*, the General Assembly enacted Section 6524 of the Revised Statutes, now appearing in the General Code as Section 10299. This section, however, applies only to orders discharging or refusing to discharge attachments. This would seem to leave the other matters in which error is prosecuted to the court of common pleas in the situation that the matter of attachment was in at the time of the decision of *Baer, Harkeimer & Co. v. Otto, supra*. The claim of the defendant in error here is that no bill was before the court of common pleas on the hearing of this case in that court, and so, whether the evidence could or could not have been before it by bill of exceptions, it was not before it at all. If it could have been brought before it by bill, that should have been done. If it could not, the party excepting was in the same unfortunate situation as the losing party in the case of *Baer, Harkeimer & Co. v. Otto, supra*.

In either event, the court erred in reversing the judgment of the justice, and the judgment of the common pleas court is here reversed, and the judgment of the justice affirmed.

AGREEMENT FOR ARBITRATION.

Circuit Court of Cuyahoga County.

B. W. ERNST V. WILLIAM McDOWELL ET AL.

Decided, November 27, 1911.

Arbitration—Declaration that Party Will Not Stand by Award Does Not Amount to Revocation—Parol Award Sufficient—Disqualifying Interest of Arbitrator.

1. The mere declaration of a party to an arbitration agreement, communicated to one or more of the arbitrators, that he will not stand by any decision they may make, is not alone sufficient to revoke the agreement to arbitrate.
2. If the arbitration submission does not expressly direct that the award be in writing, an oral award is sufficient, there being no statute requiring a written award.
3. The mere fact that one of the arbitrators named in an arbitration agreement is a creditor of one of the parties to it, is not sufficient to disqualify the arbitrator from serving as such and does not, of itself, require that the award made be set aside.

Ford, Snyder & Tilden, for plaintiff.

Herrick & Hopkins and *D. C. Parker*, contra.

MARVIN, J.; WINCH, J., and HENRY, J., concur.

The parties to this action, Ernst and McDowell, entered into a written agreement on the 6th day of April, 1909, which agreement reads as follows:

“CLEVELAND, O., April 6th, 1909.

“We, William McDowell and B. W. Ernst, both jointly and separately hereby agree that in view of a misunderstanding and disagreement in regard to a certain contract for work done at Upper Sandusky, said contract for work having been done by B. W. Ernst, who did not complete the same, William McDowell doing the unfinished portion of the work for B. W. Ernst and

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completing said work in accordance with the plans and specifications of the engineer in charge representing the village of Upper Sandusky for whom the work was being done.

"Now there being a misunderstanding and disagreement in regard to the amount claimed by Mr. McDowell as due him for the completion of said work, we hereby agree to leave this disputed amount to the following named gentlemen, Mr. E. W. Sloan, A. F. Helm and H. C. Bradley, as arbitrators and also agree to abide by the decision rendered in regard to a settlement of all the questions in dispute. This finding of the arbiters to be final and no further action to be taken by either of us pertaining to this question in dispute.

"Witness our hands and signature this 6th day of April, 1909.

"Witness:	(Signed) B. W. ERNST,
"E. W. SLOAN,	(Signed) WM. McDOWELL.
"A. F. HELM,	
"H. C. BRADLEY."	

On the same day the three men named as arbitrators met and agreed upon their award, but did not then reduce such award to writing. It will be noticed that the contract of submission does not require that the award be made in writing.

On the day the award was agreed upon, the defendant, Wm. McDowell, was apprised of what it was by one of the arbitrators. He was dissatisfied with the award, and either that evening or the next day gave notice in writing to two of said arbitrators, but not to the defendant, that he would not stand by any decision made by the arbitrators, giving as a reason that one of the arbitrators was an intimate friend of the plaintiff, and that he believed such arbitrator to be financially interested in the matter before him.

The arbitrators, however, reduced their award to writing, after receiving such notice, and furnished to each of the parties a copy of such writing, which reads as follows:

"April 7, 1909.

"MESSRS. B. W. ERNST AND WM. McDOWELL.

"*Gentlemen:* Your committee, appointed by you and mutually agreed upon to arbitrate the disputes and determine the compensation to be received by each in the sewer contract of Upper Sandusky, Ohio, which was started by Mr. B. W. Ernst and completed by Mr. W. McDowell, decides as follows:

“Mr. B. W. Ernst is to receive all the money now left on the work and now on deposit at the First National Bank of Upper Sandusky, approximately twenty-two hundred and five dollars (\$2,205) as his share of the proceeds. The same to be paid within ten days.

“Mr. Wm. McDowell is to complete any work now unfinished upon the contract, within the specified time allowed, and is to receive the one thousand dollars (\$1,000) now held by the village of Upper Sandusky as guarantee for the completion of the contract, in accordance with the specifications, as his share of the proceeds.

“Your committee has carefully considered the evidence presented and it is their unanimous opinion that this decision does justice to both parties.

“Respectfully submitted,

“A. F. HELM,

“E. W. SLOAN,

“H. C. BRADLEY.”

The defendant McDowell refuses to abide by said award, and has withdrawn from the bank where the money was on deposit, a large part thereof.

The present suit, under the amended petition, is to recover judgment against McDowell for a fixed amount of money claimed to be due under the award.

The original petition prayed for an injunction against the bank, to restrain it from paying any of the awarded money to McDowell, and for an order that it pay the same to the plaintiff. By the amended petition, however, it is shown that the bank has paid to the plaintiff all the money remaining in its hands, to-wit, \$721.62; and so, as already said, the only relief now prayed, on the part of the plaintiff, is a judgment for money only.

The answer to this petition, however, filed by McDowell, raises the issues hereinafter discussed, and prays to have the contract of submission and the award set aside, and that the money paid by the bank to the plaintiff be recovered by McDowell.

The defendant McDowell says that he ought not to be bound by this award, because he says that before any award was made he repudiated the contract of arbitration, and so notified two of the arbitrators, Mr. Bradley and Mr. Helm. He did not

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notify Mr. Sloan, and as has already been said, he did not at that time notify Mr. Ernst.

That the award had been made, and that Mr. McDowell had been told what it was before he undertook to revoke the contract, we think is clear from the testimony of Mr. Helm, who says that the decision of the arbitrators was made on the same day that the hearing was had; that they never got together again about it; that he told Mr. McDowell what the decision was the day of the hearing, after the arbitrators had agreed, and before Mr. McDowell gave him any notice that he would not abide by the result. Later, that same evening, McDowell told him by 'phone that he had heard that Sloan was an intimate friend of Ernst and was perhaps financially interested in the result, and the next day Helm got a letter from McDowell to the same effect.

Mr. Bradley also says the award was agreed upon on the day of the hearing, which was at Mr. Bradley's office, before the arbitrators separated.

Mr. Helm says he told McDowell the exact terms of the award and what each party was to get, and on that same evening, and in that same interview before McDowell gave any notice either by 'phone or letter.

Though there may be doubt as to the exact contents of the written notice sent by McDowell to Bradley and Helm, we have what Willis McDowell, a son of the defendant, says is, if not an exact copy, a substantial copy of the notice. This notice first states that defendant has learned that Sloan is an intimate friend of Ernst, and that, to quote, "I also think he is financially interested. I will not stand by any decision made under these circumstances."

This language is sufficiently explicit to show that McDowell did not intend to abide by any award, but it may be doubted whether it amounts to a revocation of the contract of submission even if given before the award was made.

In *Brown v. Welker*, 41 Tenn., 197, the syllabus reads:

"After a question is submitted to the decision of arbitrators, by agreement, neither the power nor the duty of the arbitrators, to make an award can, in any way, be affected by the declara-

tion of one of the parties that he would not abide by his agreement. Such declarations are simply nugatory, unless the party revokes the authority conferred on the arbitrators to act in the premises."

In this case the evidence showed that Brown, one of the parties to the contract of arbitration, said to Kincaid, one of the arbitrators, when on the way to the place of meeting for the arbitration, that he would not stand for it. Commenting on this, the court, in its opinion, page 200, uses this language:

"The error of the charge is in the assumption that the mere expression of a determination on the part of Brown *not to stand to the agreement*, put an end to the contract or was equivalent to a revocation of the authority of the arbitrators. Such was not the legal effect; he might have revoked the authority before it was executed by the arbitrators but if this were not done, neither the power nor authority and duty of the arbitrators to make an award could be affected in any way by the declaration of Brown that he would not abide by his agreement."

But we are of opinion that, whatever its effect might have been, if given in time it came too late to be effective here.

When McDowell gave his notice that he would not stand by any decision made, the arbitrators had already made their decision, and that decision was the "award."

Anderson's Law Dictionary defines an award in matters of arbitration in these words: "An award is the judgment of the arbitrator upon the matters submitted."

Bouvier defines it as "the judgment or decision of arbitrators or referees on a matter submitted to them."

Second Ed. of Am. & Eng. Enc., 2d Vol., 722: It is said in the text: "If the submission does not expressly direct or the law require the award to be in writing, an oral award is sufficient." This is supported by numerous cases cited in the foot-notes.

In 1889 it was enacted by the British Parliament that, unless a contrary intention is expressed in the submission, the arbitrators shall make their award in writing.

Commenting on this, it is said in the 9th Edition of *Russel on Arbitration and Award* at page 186:

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“Formerly a parol award might have valid where the submission did not expressly provide that the award should be in writing, but since the arbitration act, a parol award will not be good unless,” etc.

It is said in *Moore on Arbitration and Award*, at page 256. edition of 1872:

“In the absence of statutory restrictions, or of stipulations in the submission, and except where the right to be disposed of is, by its own nature, capable of being disposed of only by a sealed instrument, a verbal award will be good.”

Having then reached the conclusion that McDowell never revoked the contract of submission, we come next to a consideration of the question of whether any arbitrator was disqualified. The claim on the part of the defendant is that one of the arbitrators was not qualified to act in that capacity.

The arbitrators in this case were not chosen in the usual way, but were all named by Ernst, and this was done at the suggestion of McDowell. The first man named by him was Sloan. This name he gave to McDowell several days before the written agreement was executed, which, as already said, was on the day of the hearing and decision by the arbitrators.

McDowell says in his testimony that he said to Ernst: “I will leave it to any three disinterested men that you pick out—I will let you pick them.”

Ernst did pick the three, who acted. McDowell after having several days opportunity to learn as to the fitness of Sloan, at any rate, if not so long as to the others, voluntarily signed the contract of * * * submission. He testified that when the meeting took place with the arbitrators, “I asked them if any of them was interested or knew anything in regard to the case, and all that, and they all said they wasn’t, first one and then the other.”

Of course, McDowell should be held to this contract unless he was deceived or defrauded into executing it.

The facts as to the relations between Ernst and Sloan are that they were on friendly terms socially, and that Sloan had signed bonds for Ernst in one, probably two, instances in con-

nection with his getting contracts for work for city improvements. These bonds, however, had been taken care of long before this arbitration took place. At the time of the arbitration, however, Sloan held the note of Ernst for \$1,200, which arose in this way: Ernst was bidding for jobs to be done for the city of Cleveland in the spring of 1909. He was obliged to accompany each bid with a bond or deposit of money, conditioned that if the work was awarded to him, he would enter into the contract for such work, giving proper bond for its faithful performance.

Sloan had a credit of \$1,200 given to Ernst at the First National Bank of Cleveland, that amount being charged to Sloan's account, and he taking Ernst's note therefor. None of the money was taken from the bank by Ernst, save for deposit with the city when he bid for work. The note given Sloan was not due at the time of this award. It was paid when it became due, and that without any avails from this award.

Ernst deposited at his own suggestion with Sloan two policies of insurance on his life, one for \$1,000 in the John Hancock Company, and one for \$2,000 in the Massachusetts Mutual Life. Though the deposit of these policies may not have been in law a security, these parties probably supposed they were. Under these circumstances, can it be said that a fraud was perpetrated on McDowell, or that Sloan was not a disinterested person in the sense in which an arbitrator is required to be disinterested?

Authorities are numerous on the question of disqualification of arbitrators on account of interest in the matter submitted, or of special interest in one of the parties.

In the 5th Vol. of Am. & Eng. Enc. of Law and Practice, pp. 83 and 84, authorities are collected, both English and American, and the result is summed up in the text:

"To constitute grounds for setting aside the award, the bias must have been such as to furnish reasonable ground for believing that the arbitrator was improperly influenced.

"If the interest of the arbitrator was too remote and contingent to induce any reasonable suspicion that it could have influenced his decision, the award will not be set aside."

In *Russel on Arbitration and Award*, 9th Ed., it is said at page 93:

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“If there is an engagement entered into between the arbitrator and one of the parties, unknown to the other party, which gives the arbitrator a direct pecuniary interest in deciding against the party who was ignorant of the engagement, the court will not enforce a submission to arbitration. The mere fact of owing a debt to or being a creditor of one of the parties is not such an interest as renders a person incompetent for the office.”

So in *Morse on Arbitration and Award*, Ed. of 1872, it is said on page 100:

“A debtor or creditor of one of the parties to the submission is said not to be therefor necessarily incompetent to act as an arbitrator. It should be shown further that the debt is considerable, or that it is unsecured or that the debtor is in such circumstances that the decision of this case may appreciably affect his ability to pay the debt.”

In support of the text last above quoted from Morse, and the preceding quotation from Russel, the case of *Morgan v. Morgan*, 1 Dowling, 611, is cited. In this case it appeared that an arbitrator was indebted to one of the parties. In commenting upon this, the court uses this language:

“No case has gone to the length of saying that an award can be set aside because the arbitrator was indebted to one of the parties.”

To the same effect is the case of *Wallis v. Carpenter*, 13 Allen, 19. In this case one of the arbitrators was in debt to one of the parties. This was established by the evidence, and yet the court say, on page 24:

“There is no established fact which authorizes the suggestion that the existence of the debt creates partiality.”

Taking into account the facts in this case, that the money for which Sloan held the note of Ernst was for money in the bank, which it was understood between them would be checked out only to deposit with the city from time to time, when bids were rejected, or in case bids were accepted, to be returned as soon as contracts were entered into, and that this arrangement was strictly carried out; that Sloan held the two insurance pol-

icies, which the parties supposed constituted security, and that no effort to conceal any fact from McDowell as to the relation of the two men, Sloan and Ernst; that Ernst told McDowell several days before the submission that he had selected Sloan; that McDowell entered into the written contract for submission of the controversy to these three men by name, we fail to find that any fraud was perpetrated on the defendant, which would justify the setting aside of the contract, or that either arbitrator had such interest in the result of the issue or any such interest in the plaintiff, as would justify setting it aside; and so the prayer of the defendant McDowell, that such contract and the award thereunder be set aside, is denied, and the plaintiff is given judgment for the amount fixed by the award, with interest, deducting therefrom the amount paid to him by the First National Bank of Upper Sandusky, as hereinbefore found, as of the date when such payment was made.

PLEADING IN DIVORCE AND ALIMONY PROCEEDINGS.

Circuit Court of Cuyahoga County.

CLAYTON THOMAS V. ISABELLE THOMAS.

Decided. November 27, 1911.

Alimony Pendente Lite—Sufficiency of Petition to Authorize Allowance of.

In the absence of a motion to make it more definite and certain, a petition for divorce and alimony will authorize an order allowing alimony *pendente lite* where it alleges extreme cruelty on the part of the husband, specifying that he failed to resent insults offered to her by another in his presence, and gross neglect of duty, specifying failure to provide her suitable clothing.

Wood, Miller & Rothenberg, for plaintiff in error.

Bernsteen & Bernsteen, contra.

MARVIN, J.; WINCH, J., and HENRY, J., concur.

Isabelle Thomas is the wife of Clayton Thomas. She brought suit in the court of common pleas for divorce and for alimony.

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The case being pending in the court, she made a motion for alimony pending the suit, and the court ordered such alimony paid to her.

It is suggested on the part of the defendant in error that this is not a final order, but we hold that it is, in such sense that error may be prosecuted to it here.

The error complained of is that the court allowed this alimony in a case in which the petition failed to state a cause of action for either divorce or alimony, and it is upon this question that the case is submitted to us.

Without determining whether such alimony could be allowed or not in a case where the petition failed to state a cause of action, it is sufficient for the purpose of this case to find, as we do find, that the petition, unchallenged by any motion to make it definite and certain, states a cause of action.

The petition avers that the defendant was guilty of gross neglect of duty in this, that ever since said marriage of said plaintiff to said defendant, the said defendant has failed to provide for her a proper home, according to her station in life; that he has compelled her to live with his parents, refusing to keep a house himself, and although she has many times requested and demanded that he obtain a residence for himself and live apart from his folks, yet he has refused to do so, and still refuses so to do.

Plaintiff further says that during their married life he has failed to provide her with the necessary clothing, according to her station of life, and said plaintiff has been compelled to ask the bounty of her parents to obtain such clothing.

She says further that the defendant was guilty of extreme cruelty in this, that he has refused to live apart from his folks, and that his mother has insulted said plaintiff repeatedly in both the presence of the defendant and callers, and that she (the mother) has made life unbearable for her, and that when she remonstrated with her husband on the conduct of his mother, he has taken sides with her against said plaintiff.

Without stopping to read further, we think that the petition construed liberally, as the statute requires us to construe it,

sufficiently states a cause of action. Doubtless it would be for the court on the trial to determine whether the facts proved were such as to make the conduct of the defendant extreme cruelty or not. It depends somewhat on the circumstances of the defendant, and it would depend largely, so far as insults and the like are concerned, what such insults consisted of. One can well conceive of insults which might be offered to a wife in the presence of her husband by another party, the failure to resent which might constitute extreme cruelty on the part of the husband, and one may easily conceive of the circumstances which would make the failure of the husband to provide suitable clothing for his wife both neglect of duty and extreme cruelty.

No motion was made in this case to require the plaintiff to make her petition definite and certain, and as against a demurrer, we hold that this petition would be good. * So finding, we affirm the judgment of the court below.

EMPLOYEE INJURED IN ELEVATOR.

Circuit Court of Cuyahoga County.

FRED INMORE V. THE SCHOFIELD COMPANY.

Decided, November 27, 1911.

Elevator Accident—Sudden Starting Due to Negligence of Fellow-Servant, or Intruder—No Liability of Owner.

There can be no recovery by a fireman in a business building who was injured when he stepped off an elevator in the building by its sudden starting, he having operated the elevator himself, with knowledge that other employees were permitted to do the same thing, no defect in the construction or operation being shown and the only reasonable explanation of the accident being that some other employee, or fellow-servant, or some intruder upon the premises, started the elevator without warning.

Gaughan & Collins, for plaintiff in error.

Ford, Snyder & Tilden, contra.

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MARVIN, J.; WINCH, J., and HENRY. J., concur.

The plaintiff was in the employ of the defendant as a fireman in a large business block in this city. His duties were in the basement of the building, and were performed at night. On the morning of the 20th of December, 1907, at 6 o'clock, when he had completed his work for the night, and was ready to leave the building, he stepped into an elevator which was standing on the basement floor, and himself operated the elevator, raising it, with him on it, to the ground floor. Having reached the level of the ground floor, he started to step out of the elevator, when it started upward, he being partly out of it, and caught him between the floor of the elevator and the next floor above the building, in such wise that he was seriously injured.

The evidence introduced on the part of the plaintiff showed that this elevator was one which the various employees in the building were accustomed to run up and down, each for himself as he had occasion to use it; that because of that fact, the plaintiff used it; that he had knowledge that the other employees in the building were accustomed to use it as he did. No notice was given to him that somebody else was going to use it at the time he undertook to step off. The elevator was in perfect condition; there were at least two other employees of the company about the building; one was the night watchman. The probability would seem to be, though there is nothing certain about it, that one of these men started the elevator as the plaintiff was stepping from it. If so, he was a fellow-servant with the plaintiff, and this would bar a recovery in the action.

As already said, the plaintiff knew that the various employees were accustomed to use this elevator as they had occasion to use it. Knowing this, he chose to use it, and did use it, and was injured, not because of any improper construction or condition of the elevator itself, but because of some reason other than improper construction or improper condition of the elevator. What that something was is a matter of conjecture, but as already said, the probabilities are that one of the other employees, who were known by the plaintiff to be about the building at the time, started it. If not, it would seem as though it must have

been some intruder upon the premises, who was there without any permission or license from the employer. In either event the plaintiff would not be entitled to recover.

At the close of the plaintiff's evidence, the court directed a verdict for the defendant, and the judgment is affirmed.

**RECOVERY FROM EXECUTOR OF TAXES PAID BY
REMAINDERMAN.**

Circuit Court of Cuyahoga County.

W. SCOTT ROBINSON, EXECUTOR, v. FRANCIS W. BOWLER.

Decided, November 27, 1911.

Taxes—Life Tenant's Duty to Pay—Remainderman Who Pays Not a Volunteer.

Plaintiff was entitled to the remainder in certain real estate, subject to a life estate in another. The life tenant died October 24, leaving a will of which defendant was executor. Before December 20, 1909, plaintiff requested defendant to pay the taxes for 1909, payable at that time, which defendant refused to do, the same remaining unpaid until March 16, 1910, when plaintiff paid all the taxes for 1909 and penalty attached for non-payment of the part due December 20, 1909, and presented his claim therefor to the executor who rejected it. Suit being brought upon the claim, *Held*: The taxes were a debt of the estate of the life tenant, and it was the duty of her executor to pay the same; the remainderman was not a volunteer in paying them and was entitled to recover.

T. H. Johnson and William Howell, for plaintiff in error.

A. A. & A. H. Bemis, contra.

MARVIN, J.; WINCH, J., and HENRY, J., concur.

M. Louise Bowler died on the 24th day of October, 1909. She was tenant for her life of certain real estate in this county. Francis W. Bowler was entitled to the remainder in the same real estate upon the determination of said life estate.

The taxes upon said real estate for 1909, were not paid by the life tenant, nor by the plaintiff in error, who is the executor of her

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will. Before the 20th day of December, 1909, Francis W. Bowler requested the executor to pay said taxes. This the executor refused to do, and the part of said taxes which, by law, were payable on or before the 20th day of December, 1909, remained unpaid until the 16th day of March, 1910, when the plaintiff paid the entire taxes on the premises for the year 1909 with the penalty which was attached for the non-payment in December, 1909.

Bowler presented a claim against the executor on account of such payment, and this was rejected. Bowler, by his action in the court below, sought to recover the amount so paid by him.

The foregoing are the facts as they appear by the petition and the answer in the case. On motion of Bowler the court gave judgment in his favor upon the pleadings, and this is presented here as error.

First, were the taxes for all of the year 1909 chargeable to the life tenant? Section 5680, General Code, provides that "each person shall pay tax for the lands of which he is seized for life," etc.

Section 5671, General Code, provides that the "lien of the state for taxes levied for all purposes in each year shall attach to all real property subject to such taxes, on the day preceding the second Monday of April annually and continue until such taxes with any penalty accruing thereon are paid."

Section 2593, General Code, provides that "on or before the first day of October of each year, the county auditor shall deliver to the county treasurer a true copy or duplicate of the books containing the tax list required to be made by him for the year.

In reference to the estate of deceased persons. Section 10662, General Code, provides that "taxes or penalty lawfully placed on a duplicate shall be a debt of the decedent to have the same priority and be paid as other taxes, and collectible out of the property of the estate."

Section 2658, General Code, provides that "when taxes are past due and unpaid, the county treasurer may distrain sufficient goods and chattels belonging to the person charged with such taxes," etc.

Section 5678, General Code, provides, "If one-half the taxes charged against an entry of real estate is not paid on or before the 20th day of December in that year, or collected by distress or otherwise," etc., clearly showing that the remedy by distress provided in General Code 2658 is not confined to personal property, but extends as well to real estate.

In *Hoglen & Houck v John Cohan*, 30 O. S., 436, it is held that "taxes levied upon real estate, and which become a lien upon such real estate in April in each year, becomes due on the first day of October in each year, that being the date on which the duplicate of taxes is required by law to be placed in the possession of the county treasurer."

In the opinion in this case, the court uses the following language:

"True the treasurer can not enforce collection until after the 20th day of December, not for the reason that the taxes are not due, but because certain days of grace are given the owner in which to make payment, before penalty will be added for his delinquency."

These statutes and this case, together with others having a bearing upon the question (see especially *Welch v. Perkins*, 8th Ohio, 53, where it is held that the administrator may sell land to pay taxes which decedent owed at his death), lead us to the conclusion, as we think, the inevitable conclusion that, when Mrs. Bowler died on the 24th day of October, 1909, she owed the taxes on this land for the entire year; that this was in the nature of a debt, payable out of an estate left by her, personal or real, and unless Francis W. Bowler, when he made the payment, on March 16th, 1910, is to be treated as a volunteer, paying the debt of another when it was none of his business, he was entitled to recover as he did in this action.

On this latter question, there would seem little question that Bowler might pay the taxes as he did, and maintain his action against the executor on account of such payment. He was not a volunteer, forcing himself in where he had no interest. His lands were subject to a lien for the payment of these taxes, the time for payment of the first half of the year had passed, and

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a penalty had already attached—interest was accruing; until these taxes were paid, his title to his lands was under a cloud, and the amount to be paid was increasing; the executor had refused to pay. His situation was far removed from that of one who officiously intrudes into the business of another. Authorities on this point, cited in the brief of counsel for the defendant in error, fully sustain the position, that Bowler is not to be held as a volunteer. See especially *Erwin v. Argus*. 93 Federal, 629-633.

There the court quotes from authorities, and on the weight of such authorities, and the justice and reason of the rule, says:

“Where it is shown that the payment was for the protection of his own property and he is compelled to pay what the defendant himself ought to have paid, the payment under such circumstances will not be deemed to have been officiously made, nor will the plaintiff be looked upon as a mere volunteer or intermeddler in matters in which he has no interest or concern.”

We reach the conclusion, therefore, that the judgment was right, and it is affirmed.

TITLE TO AN ISLAND IN A CANAL RESERVOIR.

Circuit Court of Franklin County.

STATE OF OHIO V. MARGARET FENN ET AL.

Decided, March 26, 1912.

Title—Where Held by a Chain Direct From the U. S. Government, is Good as Against a Claim of Constructive Appropriation by the State.

Where title to an island situated in a canal reservoir is claimed under a patent issued by the U. S. Government and a direct chain of mesne conveyances, an action in ejectment can not be maintained by the state on the ground of constructive appropriation and possession by virtue of its being surrounded and at times partially overflowed by the waters of the reservoir, but the occupancy by the state must have been actual, open, notorious and direct.

Timothy S. Hogan, Attorney-General, for plaintiff in error.
Thompson & Slaubaugh, contra.

ALLREAD, J.; DUSTIN, J., and FERNEDING, J., concur.

The state brought an action in ejectment to recover a small tract of land known as Circle island in Buckeye lake.

The defendant recovered in the court of common pleas, and the state brings the case here upon petition in error.

The defendant, Margaret Fenn, claims title under a patent deed from the United States to William Hodgson dated August 10, 1850, and by regular chain of mesne conveyances.

The patent deed included 41.81 acres, a large portion of which is on the mainland and outside the reservoir or lake. The patentee and those claiming under him down to Charles Pence in 1905 claimed ownership and possession of the island as part of the patented tract. From 1865 to 1894 Rachel Shell held title and had constructed and operated a hotel and summer resort upon the mainland at a point near the island, known as Shell beach.

July 19, 1905, Charles A. Pence bought the island from the successor in title of the patentee and built a summer cottage at a cost of \$1,000.

Pence, on June 16, 1906, conveyed to Margaret Fenn, who shortly after the purchase constructed a concrete wall around the island and concrete docks, and also cut a deep water channel between the island and mainland and made fills and other improvements upon the island at a cost of \$12,000.

Before the Fenn improvements the mainland extended out in a point toward the island and to within two hundred to five hundred feet at the ordinary stage of water. From this point a ridge extended to the island. The ridge was usually submerged to a depth of from two to five feet. In dry seasons, however, in midsummer the water often receded so as to leave a dry passage way to the island. Prior to 1905 the owners of the mainland had access to this island over the dry lands in the dry seasons and in other seasons by fording the shallow water and by boat. The land was used by the owners of the patented tract at occasional times for pasture, hunting, fishing and camping.

The state's claim of title is founded upon an alleged appropriation for canal purposes.

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The Licking reservoir was constructed by the state about 1833 to 1835 and was used for canal and navigation purposes. In 1901 the reservoir was dedicated to the public by legislative act as Buckeye lake subject to canal uses.

The state's claim of title is based, first, upon selection and appropriation as against the United States Government under the act of Congress of 1828, and, second, by continued use after the patent, constituting an appropriation against the patentee under Section 8 of the Canal act of 1825.

Under either claim we think it became incumbent upon the state to establish an appropriation for canal purposes.

The state seeks to establish an appropriation of the island.

(1.) By constructive possession following from its being surrounded by the waters of the reservoir.

(2.) By its occupancy and use by the waters of the reservoir at flood water level as augmented by the roll of the waves.

(3.) By constructive possession arising from the original standard level.

(4.) By possession, more or less actual, of a portion of the island by waters up to the waste weir level and also up to the level of the waters at ordinary stage.

It is not contended that either the third or fourth contention show an occupancy of the whole island but go rather to the question of encroachment.

We are unable, however, to accept any of these tests as the exact basis of the state's title as applied to the case at bar.

It is broadly stated in many cases that occupancy of the state for canal purposes constitutes an appropriation and vests the fee simple title in the state. That doctrine in the measure stated is applied only where the appropriation by the state is admitted or clearly established. The justice of this rule of evidence is manifest.

Where the fact of the appropriation is in dispute, the possession and occupancy of the state, in order to confer title, must be shown to be actual, open, notorious and direct, and not merely constructive, incidental, and indirect. In the case of *Smith v. State*, 59 O. S., 278, it was held that in order to acquire title by the state to canal lands by occupancy:

“It is necessary that the occupancy by the state be exclusive and that it be so open and notorious as to put the owner on notice that the property has been taken by the state for its own with the purpose of incorporating it as part of the canal system.”

The doctrine so announced has been supplemented and extended in the case of *Miller v. Weisenbarger*, 61 O. S., 561, where it is held that:

“The mere incidental backing of water up a stream caused by the erection of a dam across a river used as part of the canal system, such stream flowing into said river, and remaining in a state of nature, except as slightly raised by such back water, does not constitute such an appropriation and use of the bed of the stream for canal purposes as to vest the fee of such stream in the state.”

The right of the state depends, therefore, upon the evidence of occupancy and use. The island in controversy does not appear to have ever been used in any way by the state for canal or navigation purposes or in fact for any purpose.

The owners of the mainland always claimed title, and, so far as capable of use enjoyed the possession and made valuable and lasting improvements.

During all this period, and until about the time suit was brought, the state exercised no acts of ownership nor disputed the possession and ownership of the patentee and his successors in title. The state's claim to possession and occupancy is merely constructive and incidental and not of such character as to confer title as against the owners and occupiers under the patent deed.

We do not think that the doctrine of a constructive berme bank can be applied under the circumstances. The existence of a berme bank and the question of its appropriation and use by the state depends upon the circumstances and the situation.

The principle which denies the state's title to lands occupied by the backwater in collateral streams and ravines where slack water navigation is provided for disposes of the claim of constructive berme banks.

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There is no doubt that a berme bank, natural or artificial, may be appropriated for the reservoir wherever necessary and proper to protect the reservoir or its use for navigation purposes, but it does not necessarily follow that a berme bank is appropriated at every point where the backwater of the reservoir exists.

We think the appropriation must be as definite and as exclusive in the case of the berme bank as any other part of the canal system.

Under the authorities we feel bound to hold that the state did not take such actual, open and notorious possession of the island as to fairly apprise the owners of an intention or purpose to appropriate the island, and did not, therefore, acquire title.

The equity and justice of this holding is strengthened by the fact that valuable improvements have been made upon faith of private ownership and without notice of any claim by the state.

It has generally been doubted whether estoppel will be applied against the state in respect to her ownership of lands. The doubt has, however, been dispelled by the late case of *State, ex rel, v. The Cleveland & Terminal Valley Railway Company*, in which the doctrine is broadly announced in respect to the ownership of land, that when the state "appears as a suitor in her courts to enforce her rights of property, she comes shorn of her attributes of sovereignty and as a body politic capable of contracting, suing and holding property is subjected to those rules of justice and right which in her sovereign character she has prescribed for the government of her people."

The state exercises possession and control of its canal lands through its board of public works and employees, and we think is fairly chargeable with such notice of the claims of private ownership and of the making of improvements thereon as to ripen estoppel.

The reference in the act of 1894 to the islands in the lake was not intended to establish a new title. The context of the act shows that the jurisdiction was intended to operate only over the lands and waters owned by the state. This declaration, therefore, does not affect the title of the defendant nor destroy the estoppel.

We have considered all the evidence. The only controversy relates to the size of the island above the water level upon the improvement of Fenn.

The material facts upon which title rests are not in dispute. Upon the ground that the decision rests upon the law of the case, and not upon conflict of evidence, we hold that the rulings and order of the trial court in respect to the motion for a new trial and the vacation of the order overruling the same is not prejudicial to the state.

Judgment affirmed.

**INFORMATION WHICH DID NOT CONSTITUTE NOTICE OF A
STREET ASSESSMENT.**

Circuit Court of Summit County.

CATHERINE RENTSCHLER ET AL V. CITY OF AKRON.

Decided, October 12, 1910.

Special Assessments—No Notice of Resolutions Declaring Necessity of Improvement—Actual Notice of Work Thereafter, No Defense in Action to Enjoin.

In an action to restrain the collection of a special assessment admitted to be excessive, no notice of the passage of the resolution declaring the necessity of the improvement contemplated having been served upon the plaintiff, it is no defense that plaintiff had knowledge of a former petition for and remonstrance against the improvement, nothing having been done thereunder, nor that she had knowledge of operations on the street after the passage of the resolution and ordinance under which the work was finally let and done.

WINCH, J.; HENRY, J., and MARVIN, J., concur.

This action was brought to enjoin the collection of a special assessment on the ground that it is excessive and that no notice of the passage of the resolution declaring the necessity of the improvement contemplated was ever served upon the plaintiff as required by law.

Both these claims are admitted by the city, but it is urged that plaintiff should nevertheless be held liable for part of the

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assessment because she had actual knowledge of the progress of the improvement.

The evidence submitted to sustain this point is not sufficient.

Plaintiff's knowledge of a former petition for and remonstrances against the improvement of the street on which her property abuts amounts to nothing, for it is conceded that nothing was ever done thereunder. A year after that petition was abandoned, the proceedings complained of were begun.

Nor is her knowledge of operations on the street after the passage of the resolution and ordinance, and the final letting of the contract for the work to be done thereunder, of any avail to the city.

It was then too late for her to submit any claim for damages or to approach the council with respect to the character of the improvement which was to be made.

The Supreme Court has held that notice to the resident landowner, substantially as required by Section 2304, is a condition precedent to the exercise of the authority to pass a valid ordinance ordering the improvement, so far as such owner is concerned, or to make an assessment on his property to pay for the same. *Joyce v. Barron*, 67 O. S., 264.

For the reasons stated in said case, we hold the plaintiff is entitled to all the relief she prays.

Judgment for plaintiff.

ACCEPTANCE OF GOODS PURCHASED.

Circuit Court of Summit County.

**FREDERICK W. ANDERSON v. THE FRANTZ BODY MANUFACTURING
COMPANY.**

Decided, April Term, 1910.

Sale of Goods—Delivery at Different Times—Acceptance of Part—Opportunity to Test.

1. In an entire contract for the sale of a certain number of articles, all alike and of the same quality, acceptance of part is acceptance of all, though delivered at different times.
2. Where the question of whether the defendant had had time to test articles sold and delivered to him before accepting them is contested, and he claims that the articles could only be tested in use and that he had sent them to a customer for that purpose, the matter of acceptance is peculiarly for the jury, and it is error to charge the jury that the undisputed testimony shows that the articles had been accepted.

WINCH, J.; HENRY, J., and MARVIN, J., concur.

The issues in this case as well as the errors complained of, are best stated by reading part of the charge of the trial judge, which is as follows:

“The controversy in this case grows out of a sale made to the defendant by the plaintiff of six pairs of automobile seats.

“It is conceded that the defendant purchased of the plaintiff six pairs of seats for which it agreed to pay ninety dollars.

“It is conceded that six pairs of seats were delivered to the defendant by the plaintiff and returned by the defendant shipping the same to the plaintiff.

“Under the evidence in this case I say to you as a matter of law that the plaintiff agreed to deliver seats which were good, strong, durable and perfect as to material and workmanship, and peculiarly suited for use in limousine automobile bodies.

“Plaintiff claims the seats he delivered were of the kind and quality, and suited for the purpose for which they were sold.

“Defendant claims that the seats delivered were not good, strong, durable and suitable for use in limousines, and that they were too light, and the iron used in the back of the same

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was not heavy enough to withstand the strain, and that they were wholly inadequate for use in said limousines.

"I say to you as a matter of law that under the pleadings in this case and the undisputed testimony, the defendant by receiving the two pair of seats, having ample opportunity to inspect and test the same, and having fitted them to limousine bodies, and then having sold and delivered them, thereby as a matter of law accepted two pair of seats, and under the pleadings in this case is bound to pay the contract price therefor.

"As to the other four pairs which were later shipped and promptly returned, I say to you that whether or not the defendant is liable to pay the contract price for them depends upon whether the four pairs of seats delivered by the plaintiff to the defendant complied with the terms of the contract, and were good and strong, and durable, perfect as to workmanship and material, and peculiarly suited to use in limousine automobile bodies.

"If the plaintiff delivered such seats as these he is entitled to recover for said four pair of seats."

We think the trial judge was wrong in holding that the undisputed testimony in the case showed that the defendant had accepted the two pair of seats. Whether they had had time to test them or not, was hotly contested, the defendant claiming that they could only be tested in use and had to be sent to their customer in Chicago for that purpose. This question was peculiarly for the jury in this case. *Williston on Sales*, Section 475.

Should the jury have found that these two pair of seats were accepted, then the balance of the charge was wrong, because this was an entire contract, and all the articles being alike and of the same quality, acceptance of part would be acceptance of all. *Benjamin on Sales*, p. 163, 6th Ed.

Notwithstanding these errors in the charge, we find no error in the court's refusal to give any of the plaintiff's requests to charge before argument. The second request very nearly states the law of the case. It is deficient, however, in assuming that the four pairs of seats were identical in character and quality with the first two pair.

For error in the charge the judgment is reversed.

**FAILURE OF LANDLORD TO REPAIR PREMISES INJURED
BY FIRE.**

Circuit Court of Summit County.

RUSSELL T. DOBSON V. CHARLES T. HOWE ET AL.

Decided, October 12, 1910.

*Landlord and Tenant—Provision in Lease for Repairs in Case of Fire—
Landlord's Neglect to Repair Relieves Tenant from Rent.*

While a tenant was in possession of a storeroom under a lease which provided, "if the premises be slightly damaged by fire they shall be promptly repaired by the party of the first part," a fire occurred and the premises were damaged by fire and also by water used in its extinguishment. The fire occurred on the fifth of the month, on the twenty-first the tenant gave notice that he would move out if the premises were not repaired, and nothing substantial being done in that respect, he moved out on the last day of the month, *Held*: The tenant was not liable for rent thereafter.

WINCH, J.; HENRY, J., and MARVIN, J., concur.

This was an action for rent on a lease of a room in a building owned by Dobson, which defendants occupied as a grocery store. Defendants defended on the ground that the store room was so damaged by fire to be unsuitable for use as a grocery store and that the landlord neglected to repair the same within a reasonable time, whereupon they vacated the premises.

The case was tried without a jury and judgment was rendered on the evidence for the defendants. It is claimed that this judgment is not sustained by the evidence and some argument is based upon the difference between the covenant in the lease regarding the situation developed by the fire and the provision of the General Code upon the subject.

Section 6521, General Code, reads as follows:

"The lessee of a building which, without fault or neglect on his part, is destroyed or so injured by the elements or other cause, as to be unfit for occupancy, shall not be liable for rent to the lessor or owner thereof after such destruction or injury, unless otherwise expressly provided by written agreement or

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covenant. The lessee must thereupon surrender possession of the premises so leased."

The lease contains the following covenant: "if the premises be slightly damaged by fire they shall be promptly repaired by the party of the first part."

In the view we take of the evidence it is immaterial whether the statute or the covenant controls.

The sole damage to the premises was from fire. While much discussion was had on the hearing with regard to damage from water, as distinguished from damage by fire, the water spoken of was that poured into the store room by firemen in an effort to put out the fire. The damage was all covered by insurance against fire, for it resulted directly from the fire which necessarily required the use of water for its extinguishment.

Having this in mind we find there was evidence sufficient to establish the proposition that the store was "so injured by the elements as to be unfit for occupancy," using the words of the statute, and that it was "slightly damaged by fire," using the words of the lease, so that it became the landlord's duty to promptly repair the same. Indeed, we think the premises were very seriously damaged by fire; though the walls remained, the room was unfit for occupancy.

The record shows that the landlord neglected his duty to repair the premises. The fire occurred on November 5; Dobson did nothing in the way of repairs except to put some boards over a skylight, where the glass was broken. This shut out the light; no heat was furnished.

On November 21, the tenants gave the landlord notice that they would abandon the premises if nothing was done to make the premises fit for occupancy. He did nothing and they moved out November 30th, paying for the month of November.

We think they had a right to move out and terminate the lease and not that the law required them to remain, make their own repairs and then sue the landlord in damages for breach of his agreement to promptly repair, as claimed by plaintiff.

There being in the record sufficient evidence to sustain the judgment, it is affirmed.

EMPLOYEE INJURED IN ELEVATOR SHAFT.

Circuit Court of Summit County.

JAMES L. DILWORTH v. GEORGE W. CARMICHAEL.

Decided, October 12, 1910.

Negligence—Fellow-Servant—Judgment on Pleadings—Assuming Facts Not Stated Therein.

In an action for personal injuries resulting from failure to give a signal before an elevator was lowered in a shaft where plaintiff was compelled to work, it is error to assume that the failure to give the signal was due to the negligence of a fellow-servant, and to render judgment on the pleadings for the defendant, where the pleadings do not state the specific employee whose duty it was to give the signal.

WINCH, J.; HENRY, J., and MARVIN, J., concur.

This was a personal injury damage case in which judgment was rendered on the pleadings in favor of the defendants.

The second amended petition alleges that plaintiff was working upon a platform erected around the exterior of an elevator shaft at a height of about twenty feet from the ground; that he was obliged in the doing of his work to allow his head or some portion of his body to extend inside the elevator shaft and in the path of the ascending or descending elevator.

The petition further alleges:

“Plaintiff further says that a whistle had been placed by said defendants on the top of said derrick for the purpose of giving warning to employees or any other persons when said elevator was about to be lowered; that prior to said 3d day of July, A. D. 1909, and prior to said accident on said day it had always been the custom of the defendants to give warning of the descent of said elevator by blowing said whistle; that this defendant and other employees while working on said derrick had always been able and accustomed to protect themselves from any and all danger from the lowering of said elevator by reason of the warning given by means of said whistle; that this plaintiff and other employees while working on and about said derrick had continuously and habitually depended and relied upon the

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blowing of said whistle to warn them when said elevator was about to be lowered; and that this plaintiff had, at any and all times prior to said whistle always been able to secure a place of safety before said elevator was lowered.

“Plaintiff further says that said defendants always had knowledge that employees were working in and about said derrick, and that it was exceedingly dangerous to lower said elevator without the customary warning being given, by blowing of said whistle as aforesaid.

“Plaintiff further says that it was impossible to perform any of his labor on said derrick without placing himself in a dangerous position if said elevator should be released or lowered without blowing said whistle or warning having been given, but that said position was not necessarily dangerous for any other reason except as above stated; that defendants had knowledge of this fact.

“That said defendants having put said plaintiff in the position as aforesaid failed and neglected to use reasonable care to protect plaintiff while he was thus engaged from any danger to which plaintiff was exposed in the performance of his said duty, but said defendants did not protect said plaintiff from danger by blowing said whistle or giving him any warning whatever that said elevator was about to be lowered, but on the contrary the said foreman carelessly and negligently went away from said work while plaintiff was repairing said derrick and unknown to the plaintiff left or provided no one to warn said plaintiff or to protect him in his place of danger; that plaintiff was not warned by any means or in any manner that said elevator was about to be lowered; that the defendants negligently and wrongfully by its servants or agents, to-wit, their engineer, whose name plaintiff is ignorant of, without any notice or warning to plaintiff as aforesaid, put said elevator in motion whereby plaintiff was injured.

“Plaintiff further says that said injury occurred from no fault or neglect on his part, but solely and only from reason of defendants carelessly and negligently failing to warn him in his place of danger that said freight elevator was about to be lowered and in failing to provide anybody for that purpose and by carelessly and negligently putting said elevator in motion.”

The only theory on which the judgment can be sustained is the one that was urged by counsel for defendant in error that this petition shows upon its face that it was the duty of the

engineer to give the signal and that he being a fellow-servant of the defendant, the company is not liable for this negligence in this respect.

We do not agree with this conclusion regarding the averments of the petition.

It is nowhere in the petition stated that it was the duty of the engineer to give the signal. True, it is stated that the engineer "without notice or warning to plaintiff put said elevator in motion, whereby plaintiff was injured," but it may have been some other person's duty to give the signal.

The petition states affirmatively that the *foreman* "provided no one to warn the plaintiff" and that the *company* was negligent "in failing to provide anybody for that purpose." This negatives any inference otherwise to be deduced that the engineer was the person to blow the whistle which was a long distance from him, on top of the elevator, while he was on the ground.

It is likely, on the hearing, it may develop that it was the engineer's duty to give the signal, but the trial judge should not have assumed such a fact, before it developed. There was an issue on this point, for the pleadings do not concede that it was the engineer's duty to give the signal.

Judgment reversed for error in rendering judgment on the pleadings.

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**ARCHITECT RECOVERS DAMAGES FOR WRONGFUL
DISCHARGE.**

Circuit Court of Cuyahoga County.

MIKE POLOWSKY ET AL V. OTTO J. LORENZ.

Decided, October 28, 1910.

*Contract for Services—Wrongful Discharge—Measure of Damages—Rule
in Case of Architect.*

The rule that one wrongfully discharged from his employment will be entitled to recover the agreed wages or salary for the whole time, but reduced by the amount which he has or might have earned by engaging in other employment during the time of the breach, does not apply to an architect retained to draw plans of a building and superintend its construction, who is wrongfully discharged after furnishing the plans and so prevented from superintendence, for his employment does not intend that he shall devote all his time to it, and is not inconsistent with the pursuit of his profession.

C. J. Benkoski, for plaintiffs in error.

Geo. C. Johnson, contra.

WINCH, J.; HENRY, J., and MARVIN, J., concur.

This action was tried in the common pleas court, without objection, as one for damages for breach of contract of employment as an architect, though the petition seems to seek recovery on the contract itself. The question of wrongful discharge was the main question in issue upon which the jury found for the plaintiff and assessed his damages at something less than the full amount due under the contract, had the services been rendered in full.

In this court the sole complaint is that the verdict is not sustained by the evidence and is excessive. No complaint is made as to the charge, or as to the manner in which the case was tried.

We have examined the evidence as to its weight and find there was sufficient evidence to warrant the jury in its conclusion that the architect was wrongfully discharged, though the evidence was conflicting on this subject.

As to size of the verdict, we think the result was somewhat less than the architect might have been awarded.

The building cost \$16,000, the architect to have 2½% thereof as his compensation; ½ of one per cent. for the drawings, one per cent. when the contracts were let, and one per cent. for superintendence of the construction of the building. He was discharged before the erection of the building was commenced and so had no superintendence to perform.

The usual rule in such cases is that "the plaintiff will be entitled to recover the agreed wages or salary for the whole time, but reduced by the amount which he has or might have earned by engaging to any other party during the time of the breach," but "the rule does not apply to a professional man if the services he was required to render did not purport to occupy all his time, but were of a character consistent with the pursuit of his profession and were expected to be discharged concurrently therewith." 3 Sutherland on Damages, 693.

The case usually cited as sustaining this doctrine is that of a physician, *Galveston County v. Ducie*, 91 Texas, 665, but we think the exception is peculiarly applicable to the case of an architect. Before or after he goes to his office he can run around and inspect half a dozen jobs in little more time than he can inspect one, depending upon their location, of course.

At any rate, there was no evidence introduced in this case tending to show that the architect was enabled to increase his income from other sources by reason of being relieved from the obligation to superintend the erection of this building.

Viewing the law as to the measure of damages, as we do, we can not say that the verdict was excessive.

Judgment affirmed.

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Summit County.

PROSECUTION FOR PERJURY.

Court of Appeals for Summit County.

DAVID RUCH V. STATE OF OHIO.

Decided, September, 1913.

Criminal Law—Falsity of Testimony Given in Murder Case May be Proved, How—Statement by Counsel for Defendant to Jury Constitutes an Issue, When—Charge of Court as to Reasonable Doubt in Perjury Case.

1. In a prosecution for perjury for falsely swearing in a murder case that he saw the murdered man knocked down by another at a certain place, the falsity of the statement may be proved by a witness who was either with the murdered man at the time, or with the witness accused of perjury.
2. The statement to the jury of counsel for the accused in a murder case outlining the defense, presents an issue of fact for the determination of the jury, and may be introduced in evidence in the trial for perjury of a witness who testified in the murder case, as tending to show that the perjured testimony was "as to a material matter in a proceeding before a court."
3. In a trial for perjury it is not error for the trial judge to charge the jury as follows: "It is proper for the court to remind you that the issue in this case is to the defendant of so grave a nature, and to the public safety and the proper administration of justice of such vital importance, that upon your part there should be no error. In considering the rights of the accused, if you should be convinced in your judgment beyond a reasonable doubt of his guilt as charged in the indictment, do not forget that by each acquittal of a guilty person the safeguard erected by society for its protection is weakened. By the non-enforcement of penalties affixed to criminal acts, contempt for the law is bred among the kind of persons that it is intended to restrain."

WINCH, J.; MEALS, J., and GRANT, J., concur.

Error to the Court of Common Pleas.

Plaintiff in error was convicted of perjury, sentenced to three years in the penitentiary, and sentence suspended during good behavior. He claims that his sentence should be set aside for three reasons: first, because the state failed to prove its case against him; second, because improper evidence was ad-

mitted on the trial, and, third, because the court erred in its charge to the jury.

In considering the first allegation of error, it is necessary to examine the details of the charge of perjury made against the accused and the facts which must be proved by the state in order that a conviction may be had for that crime.

David Ruch was a witness for the defendant in the case of *State of Ohio v. Charles Ross*, who was accused of killing one Harry Hanna by means of a blow with a heavy stick upon the head of Harry Hanna, which caused a fracture of the skull and a hemorrhage resulting in the formation of a blood clot within the skull which pressed upon the brain until it caused death.

Ross was convicted of manslaughter. In his trial he admitted striking a blow with a stick upon the head of Harry Hanna, but claimed that the blow struck was delivered when he was lawfully ejecting Hanna from his saloon at midnight on a Saturday night, that it was delivered in self-defense, and that the blow was not sufficient to have caused the death of Hanna. During his trial he introduced evidence that Hanna that night had received other injuries upon his head which might have caused death: one a fall upon the pavement in the rear of the rathskeller in the city of Akron, after Hanna had left his saloon; and the plaintiff in error, David Ruch, was offered as a witness in behalf of Charlie Ross, and testified that at twenty minutes after twelve o'clock on the night Hanna was injured, he saw him knocked down by a man on West Market street, some distance from Ross' saloon, which was on Howard street, and that this man afterwards bent over Hanna as if to go through his pockets and rob him.

Ruch also testified in the Ross case that he kept Hanna in sight after he arose from this attack, and saw him stagger until he had proceeded east to Howard street and south on that street to the rathskeller, where he also saw him fall on the pavement.

The undoubted purpose of this evidence of Ruch was to suggest that Hanna came to his death as the result of the blow given him when he was felled to the ground on West Market

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street by a man whom he described in such a way as to fasten suspicion upon one William Metzger, who was the companion of Hanna in the saloon when Ross put them out and was the principal witness for the state in the case against Ross.

That Ruch gave the testimony claimed to be perjured on oath lawfully administered in a proceeding before a court, was admitted by him, but that it was false, he denied and he still insists that the falsity of his testimony was not established upon his trial by that amount of evidence which is required in perjury cases.

On this subject the court properly charged the jury, according to the rule laid down in the case of *State of Ohio v. Court-right*, 66 O. S., 35, as follows:

“ ‘It is the law of this state that there can not be a conviction of perjury on the sole testimony of one witness.’ To warrant a conviction under an indictment for perjury there should be at least one witness to the falsity of the matter assigned as false. It is then essential that the testimony of this witness be corroborated, either by another witness, or by circumstantial evidence sufficiently strong to satisfy you beyond a reasonable doubt of the guilt of the accused.”

It is claimed that no witness to the falsity of Ruch's testimony was introduced, but that he was convicted upon circumstantial evidence alone.

On this point it is proper to note that Ruch testified that he saw Hanna knocked down by a man on West Market street at twenty minutes after twelve. It was necessary for the state to prove that he did not see Hanna knocked down at that time and place. This it could prove by a witness who was either with Ruch at the time, or with Hanna at the time.

It produced such a witness in the person of William Metzger, who testified that he went into Ross' saloon with Hanna before twelve o'clock, left the saloon with him and continued with him until half-past twelve, accounting for their actions all that time until he left Hanna at the corner of Market and Howard streets, after seeing him start south on Howard street. He testified positively that Hanna was not on West Market street all that time, which included the time set by Ruch when he saw

Hanna on West Market street, and so, if Metzger was telling the truth, Ruch perjured himself.

The evidence of other witnesses was also given, corroborating Metzger's statements as to where he and Hanna were during the half hour after midnight, and where Hanna was thereafter until his death, so that the rule was complied with and the falsity of Ruch's testimony was abundantly proven.

The second claim of error—that improper evidence was admitted over the objection of plaintiff in error—is involved in the first proposition, for the ruling complained of was the admission in evidence against Ruch of the opening statement of counsel for Ross in the Ross case, in which said counsel stated, among other things:

“We expect to show this fellow (Hanna) was staggering around town and been knocked down by other people, and been robbed, and had fallen down at least half a dozen times on the pavement, and on the curbing and sidewalk, striking his head.

“The evidence will also show that when the police searched him there was only \$3.69 on his person—that this money had disappeared somewhere. That's part of our evidence that he was robbed and suffered violence.”

It was claimed for this evidence in the Ruch case that it proved the materiality of his testimony in the Ross case, and that was a thing necessary for the state to prove, for the statute, General Code, 12842, requires that the falsehood charged must be “as to a *material matter* in a proceeding before a court.”

No complaint is made that the state failed to show that Ruch's false testimony was as to a material matter in the Ross case, and indeed no such complaint could be made, for it bears internal evidence that it was as to a material matter; but it is claimed that it was error to admit the statement of counsel for Ross, outlining his defense, as evidence that Ruch's testimony was as to a material matter, for, as it is said, counsel for Ross was not counsel for the witness Ruch and could not bind the latter as to whether his testimony was upon a material matter or not.

It may be true that counsel for Ross could not make an admission in the Ross case which would bind Ruch in the per-

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jury case, but his statement to the jury in the Ross case presented an issue for its determination in that case as certainly as an answer of a defendant in a civil case would do to make up an issue therein, for there are no pleadings in a criminal case and the issues are made up by the indictment and plea, and under the plea the evidence of the defendant.

To prove that Ross did not kill Hanna, counsel said he would show that somebody else did, and to show this he offered Ruch's testimony. An examination of it shows that it was offered for no other purpose.

Confessedly it was material to Ross' defense, and no prejudicial error resulted from permitting the statement of counsel for Ross in the murder case, to go to the jury in the perjury case.

The third allegation of error is in regard to that portion of the charge to the jury wherein the trial judge said:

"It is proper for the court to remind you that the issue in this case is to the defendant of so grave a nature, and to the public safety and the proper administration of justice of such vital importance, that upon your part there should be no error.

"In considering the rights of the accused, if you should be convinced in your judgment beyond a reasonable doubt of his guilt as charged in the indictment, do not forget that by each acquittal of a guilty person the safeguard erected by society for its protection is weakened. By the non-enforcement of penalties affixed to criminal acts, contempt for the law is bred among the kind of persons that it is intended to restrain."

It is claimed by this statement the court emphasized too strongly the duty of the jury in its consideration of the case in rendering a verdict on behalf of the state.

Such can not be the case. It *was* proper for the court to remind the jury that the case was of importance to the state as well as to the accused. He is to be commended for saying what he did about the crime of perjury, as is the prosecuting attorney for bringing the case and prosecuting it to a conviction.

The testimony of Ruch in the Ross case is set out in full in the record of his own case. It shows falsehood upon its face. It was a deliberate effort on the part of Ruch to thwart justice, and deserves the severest censure a judge can give it, for

what use are judges and juries if perjury is committed with impunity.

This crime is altogether too prevalent in both civil and criminal cases. It goes unrebuked too often, because it is so common that officials as well as the public generally become accustomed to it.

Perjury lays its ax at the roots of justice. It saps its life until it withers and decays. The whole growth of justice is from truth; without it, it can not live.

“Vice is a monster of so frightful mien
As, to be hated needs but to be seen;
Yet seen too oft, familiar with her face
We first endure, then pity, then embrace.”

We have *endured* perjury too long; the difficulty of convicting of perjury, because of the burden put upon the prosecutor by the law, as somewhat indicated in the propositions discussed in this case, and the paucity of convictions when indictments have been reluctantly returned in clear cases, shows that we *pity* the perjurer, and it is high time in these stirring years of reform that miscarriage of justice in grave cases which offend all the people should be minimized by more drastic efforts to clear the temple of justice of all offenders. An enlightened public opinion upon this subject is first needed, and then, perhaps, our judges and prosecutors will better appreciate their duty in this respect. A good example has been set the people of Summit county by prosecutor, judge and jury in this case.

It may be that judges would awaken to their duty sooner if the Legislature of this state were to authorize them, as they are authorized in New York state, when it appears probable that a witness has committed perjury, to immediately commit him to jail, or take a recognizance for his appearance to answer an indictment for perjury.

David Ruch had a fair trial on his indictment for perjury. He was leniently dealt with in his sentence, for it was suspended on condition that he would quit drinking, keep out of saloons, and behave himself as a good citizen. He has nothing to complain of.

The judgment is affirmed.

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Cuyahoga County.

WORKMAN KILLED BY FALLING FROM SCAFFOLD.

Circuit Court of Cuyahoga County.

**THEODORE DLUZINSKI, ADMINISTRATOR, v. THE GRIESE-WALKER
COMPANY.**

Decided, November 9, 1910.

Wrongful Death—Negligence—What Must Be Shown.

In an action for wrongful death of a workman, killed by the falling of a scaffold upon which he was working, due to alleged defective construction thereof, in the absence of a statute otherwise providing, in order that plaintiff may recover it must be shown that the construction of the scaffold was defective, that the defendant had knowledge of the defect, or ought to have had, and that the deceased did not know of the defect and had not equal means of knowing with the defendant.

D. N. Stone, for plaintiff in error.

M. P. Mooney, contra.

WINCH, J.; HENRY, J., and MARVIN, J., concur.

This was an action for wrongful death, verdict for defendant being directed at the close of plaintiff's evidence.

The petition alleges that plaintiff's decedent was a hod carrier in the employment of the defendant company, and that while stepping upon a scaffolding constructed or caused to be constructed by the company for his use, it gave way by reason of the weak, negligent and careless manner in which it had been constructed, precipitating him to the ground, whereby he was mortally injured.

The petition further alleges that the defendant knew, or ought to have known of the dangerous condition of the scaffolding and that the defect therein was not so obvious and apparent that the deceased should have been able to guard himself, nor was he informed that the scaffolding was not properly constructed, and that it gave way without any fault on the part of the deceased, but solely through the negligence of the defendant.

The answer admits that the deceased was employed by it as a hod carrier and fell from a scaffolding caused to be constructed by it for the purpose alleged in the petition, and was so injured by his fall that he shortly thereafter died. It denies all other allegations of the plaintiff.

Upon the three propositions that the plaintiff was called upon to establish under the rule laid down in the case of *Coal & Car Co. v. Norman*, 49 Ohio St., 598, 607, the evidence was very meager.

1. Was the scaffolding defective?

There was evidence introduced tending to show that the floor of the scaffolding upon which the deceased stepped from a ladder upon which he ascended to it was composed of planks, ten or twelve inches in width; that he stepped from the ladder upon one of these planks against which the ladder rested and that this plank had a square end which rested upon the pointed end of another plank; as he stepped upon the second plank with the pointed end the latter slipped over to one side, tipped, and the hod carrier was thereby precipitated to the ground. The plank with the pointed end was described as one prepared for driving into the earth.

Probably the end was V shaped, as in sheathing used in sewer excavations.

We think this evidence was sufficient to warrant a submission to the jury of the question whether or not the scaffolding was defective.

2. Did the defendant have notice or knowledge of this defect or *ought* it to have had?

It will be remembered that while the answer admits that it caused the scaffolding to be constructed, it denies that it knew or ought to have known of this defect.

It was shown that the defendant furnished the material used. It was *not* shown that any one in authority over the deceased put the planks in position on the floor of the scaffold. If the deceased or any one of his fellow-servants superimposed the square end of one plank upon the pointed end of another plank, the company would not be liable for the faulty construction. If the defendant caused the planks to be laid under the direc-

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tion of some one in authority over the deceased, it would be liable for the defect, for then it would know, or ought to know of the faulty construction. There was no evidence that the matter had ever been called to the attention of the defendant or any one of its officers or agents or any one in authority over the deceased.

We have considerable doubt as to whether there was sufficient evidence to go to the jury on the proposition that the defendant knew, or ought to have known of this defective construction.

3. It was incumbent upon the plaintiff to show that the deceased did not know of the defect and had not equal means of knowing with the defendant.

Upon this proposition the plaintiff wholly failed to make a case.

On the contrary, he showed that the faulty construction was patent and open to casual observation.

His chief witness testified that he came into the building just before the accident, looking for work. He stood at the bottom of the ladder and watched the deceased come down it with an empty hod, fill it with brick and go up the ladder again. He looked up as the deceased stepped from the ladder upon the plank upon which the ladder rested; noticed that that plank had a square end and rested upon the pointed end of another plank. The witness seeing this situation, stepped aside so that he would not be in danger if the very thing should happen which did happen. As he foresaw, the plank tipped and fell and the accident occurred.

The evidence shows that for two days and three hours before the happening of the accident, the deceased and three other hod carriers stepped upon these two planks, perhaps twenty times an hour, and used them in the identical manner in which the deceased was using them when the accident occurred. The second plank was but one step from the ladder. Every time the deceased went up the ladder he must have seen just what the witness saw from the foot of the ladder. We think that the evidence is clear and shows that the deceased himself knew, or ought to have known of the defect; at least he had equal means of knowing with the defendant.

So long as the rule laid down in the Norman case is to be applied, there can be no recovery under such circumstances as were shown in evidence by the plaintiff in the case, and plaintiff in error does not claim the benefit of any statute in this behalf.

Verdict was properly directed for the defendant and the judgment is affirmed.

CONSIDERATION FOR ASSIGNMENT OF A LEASE.

Circuit Court of Cuyahoga County.

EMIL LEUCHTAG V. PHILIP SCHAEFER ET AL.

Decided, November 9, 1910.

Landlord and Tenant—Assignment of Lease—Implied Warranty of Landlord's Title.

An implied warranty as to the lessor's title or right to demise, goes with an assignment of a lease.

Benesch & Kornhauser, for plaintiff in error.

Lang, Cassidy & Copeland, contra.

WINCH, J.; HENRY, J., and MARVIN, J., concur.

The question for review in this case is whether a demurrer to the petition filed in the case below was properly overruled.

The petition asks that Leuchtag, who was defendant in the case, be restrained from transferring certain notes delivered to him by the Schaefers as part consideration for the assignment of a lease and that the notes be canceled on the ground that the consideration thereof had failed.

The allegations in this respect are that on April 16, 1907, one Patrick Fitzgerald executed the lease in question to one John Kofron for a term of four years. Thereafter Kofron assigned the lease to the defendant Leuchtag, and he in turn on April 1, 1909, duly assigned all his interest in the lease to the Schaefers.

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Fitzgerald's interest in the property terminated October 1, 1909, whereupon the real owners of the property demanded possession of the premises.

The demurrer to the petition raises the question whether any implied warranty as to the lessor's title or right to demise goes with an assignment of a lease, counsel for plaintiff in error claiming that the only things which Leuchtag, in this case, warranted, were that *his* title to the lease which Fitzgerald had made was good and that the paper was genuine and not a forgery. He says that the Schaefers should sue Fitzgerald and not him.

The question does not seem to have been settled in Ohio, but we have a dictum, in the case of *Wetzell v. Richcreek*, 53 Ohio St., 62, 69, which so clearly sets forth the view of the Supreme Court upon this subject, that we feel constrained to follow it, until that court passes squarely upon the matter.

That dictum is as follows:

"It is held by some authorities, that no covenants are implied in the assignment of a lease. *Waldo v. Hall*, 14 Mass., 486; *Blair v. Rankin*, 11 Mo., 442. Other authorities, however, maintain the contrary doctrine. Thus, in *Souter v. Drake*, 5 B. and Ad., 992-1002, it is said by Lord Denman that 'unless there be a stipulation to the contrary, there is, in every contract for the sale of a lease, an implied undertaking to make out the lessor's title to demise, as well as that of the vendor to the lease itself, which implied undertaking is available at law, as well as in equity.' This would seem to be the better rule, because, it can hardly be supposed to be the intention of one party to purchase, or of the other to sell the mere instrument of lease without any beneficial interest under it, but rather that the subject of the purchase and sale is the right to enjoy the term purported to be demised, and all the benefits which it stipulates to confer on the lessee."

The common pleas court evidently adopted the view thus expressed and overruled the demurrer. We are disposed to do the same without further consideration of the conflicting cases from other jurisdictions, the cases relied upon by counsel for plaintiff in error being mentioned in said dictum, as not expressing the better rule.

Judgment affirmed.

APPEAL AS TO CUSTODY OF CHILD.

Circuit Court of Cuyahoga County.

HOMER SCHULTZ v. LOUISE SCHULTZ.

Decided, November 14, 1910. .

Parent and Child—Custody of Little Girl as Between Father and Mother.

Other things being equal, the custody of a little girl of tender years should be awarded to her mother, but where the mother shows little affection for the child, she will be given to the father.

E. C. Schwan, for plaintiff in error.*Alexander & Dawley*, contra.

WINCH, J.; MARVIN, J., and HENRY, J., concur..

This is an appeal under favor of Section 8035, General Code, from the judgment of the common pleas court in a divorce case awarding the custody of a female infant six years old to the father, to whom a divorce was granted from the mother on the ground of her gross neglect of duty.

Other things being equal, it seems that a little girl of tender years should be in the custody of her mother rather than of her father, if she is so unfortunate as to be unable to live with both.

From the evidence in this case we find that the mother is now living with her mother, the child's grandmother, who loves the little girl dearly, and greatly wants it with her. This grandmother's home would be a comfortable place for the child.

The mother is working every day at the tack works, earning about \$1.25 per day. We believe her conduct since the divorce last June has been without reproach.

From the husband's testimony it appears that much of the marital trouble was over this child.

When the child was sixteen months old the mother let the grandmother have her and the little girl lived with her grandmother until her parents were divorced.

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The mother says the father consented to this arrangement but he denies it. When asked by the court why *she* consented to such an arrangement the mother made no satisfactory reply.

We do not think the mother's conduct towards the child in this respect, during the years she was free to have it with her shows the full maternal love, nor does it promise a full performance of a mother's duty toward the child.

She says the grandmother took such pleasure in the child that she could not deny her the little girl.

Selfish love of the grandmother has here, perhaps, caused a daughter to lose her husband and might cause a grandchild to lose her parents, for by placing the child with this grandmother she would be taken from her father, with little assurance that the mother would share in the grandmother's care of her, or give her any more attention than she did before.

We find the father to be a suitable custodian for the child. He is living with his parents, who are comfortably situated and glad to have the little girl with them.

We are not disposed to make any change in the custody of the child, but it is apparent that the provision in the order now governing the mother's access to the child is inadequate.

It is therefore ordered that the father cause the child to be taken to the mother's home every Saturday, not later than three o'clock in the afternoon, and leave her there until Sunday following, when he may call or send for her, taking her away not earlier than twelve o'clock noon. The decree may also provide that the father pay the mother fifty cents a week for the support of the child while it is visiting at the mother's house, and the costs in this court are assessed against the plaintiff.

**INJURIES WHICH COULD NOT BE REASONABLY
ANTICIPATED.**

Court of Appeals for Hamilton County.

DAVID DUNHAM V. THE BALTIMORE & OHIO SOUTHWESTERN
RAILROAD COMPANY, ETC.

Decided, January 17, 1914.

Negligence—Not Chargeable to a Railway Company—For Injuries Resulting From the Explosion of a Torpedo, When.

An injury to one about to cross a railway track as a licensee at a place other than a public highway by the explosion by a passing train of a torpedo which had been placed upon one of the rails for the purpose of signalling the train crew, is not in contemplation of law such an injury as could have been foreseen or reasonably anticipated, and does not afford a basis for an action against the railroad company.

Horstman & Horstman, for plaintiff in error.

Harmon, Colston, Goldsmith & Hoadly, contra.

JONES, E. H., J.; SWING, J., and JONES, O. B., J., concur.

Plaintiff in error was injured by the explosion of a signal torpedo, caused by a locomotive of the defendant company passing over said torpedo which it must be presumed had been placed upon the track in the ordinary way as a warning or signal to the train crew.

The evidence shows that Dunham at the time of his injury was in the act of crossing the right-of-way and tracks of the defendant company at the intersection of the tracks with Charles street in what was formerly the village of Madisonville. The right-of-way at this point is one hundred feet in width and is from fifteen to twenty feet higher than the surface of the surrounding ground. Charles street does not cross the right-of-way, but extends to it on either side. At the time of the injuries complained of Mr. Dunham was about to cross the tracks of the defendant company from north to south, and was standing upon the somewhat steep embankment leading from North Charles

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street up to the level of the railroad tracks, waiting for the passing of the train whose locomotive caused the torpedo to explode.

The allegations of negligence contained in the petition are:

“That the plaintiff was upon said footpath for the purpose of crossing over said embankment, when a torpedo, which had been placed by defendant’s employees and agents upon the rails of said track, exploded by a train of cars passing over the torpedo, and that parts of said torpedo struck the left forearm of plaintiff and injured the same so as to permanently disable him from the use of said arm. Plaintiff says that defendant was negligent in placing said torpedo unnecessarily upon said rail at or near the place where the public, including the plaintiff, were accustomed to cross over said right-of-way along said Charles street.”

The trial court, upon motion of the defendant, instructed a verdict in its favor, and it is to reverse the judgment rendered thereon that this proceeding in error is prosecuted.

There is no evidence to show that it is usual for torpedoes or particles thereof to fly through the air upon being exploded in the manner in which this was exploded. and no evidence but that the torpedo was placed where it was for a lawful purpose and in the ordinary course of the conduct and management of the road. Mr. Dunham at the time, in his relation to the defendant company, was a licensee, probably using the right-of-way with permission of the company for the purpose of crossing from North Charles street to South Charles street. There is evidence showing that the right-of-way for a long time had been so used although the surrounding territory was not thickly inhabited, Charles street on the north side being an unimproved street and existing only as a paper street upon the recorded plats.

We think under these facts that it would be requiring extraordinary care on the part of the defendant company to hold it liable for the injury sustained by Mr. Dunham, and that the court below was correct in the action taken in directing a verdict for the defendant. We are satisfied from the evidence, and from our own knowledge gained from personal experience and observation, that the accident was an unusual one, and one

which could not have been foreseen by the defendant company or its employees in the exercise of ordinary care. The negligence shown by the evidence is not actionable and could in no event furnish the basis for a judgment. As stated above, there was no evidence offered by plaintiff to show that there was any danger that could have been foreseen from the explosion of the torpedo, or to show that it was usual following the explosion of a torpedo, used in the operation of a railroad, for particles of it to fly at such a distance and inflict bodily harm. The cases cited in the printed brief of defendant in error on page 20 are decisive of this case and furnish ample authority for the action of the court below. See *Miller v. B. & O. S. W. R. R. Co.*, 78 O. S., 309, the second paragraph of the syllabus:

“In contemplation of law an injury that could not have been foreseen or reasonably anticipated as a probable result of an act of negligence is not actionable.”

On page 325 of the opinion in the above case the court say:

“The rule is elementary that a defendant in an action for negligence can be held to respond in damages only for the immediate and proximate result of the negligent act complained of, and in determining what is direct or proximate the rule requires that the injury sustained shall be the natural probable consequence of the negligence alleged; that is, such consequence as under the surrounding circumstances of the particular case might and should have been foreseen or anticipated by the wrong-doer as likely to follow his negligent act.”

See also *R. R. Co. v. Kinz*, 68 O. S., 210, the facts in which case are not like those in the case under consideration by us, but the principle which controls is the same. In the case just cited the Supreme Court in reversing the judgment of both lower courts held that the petition failed to state a cause of action, and that the court erred in refusing to direct a verdict for the defendant below.

We think that the petition of Mr. Dunham fails to state a cause of action and that his evidence fails to show actionable negligence.

The judgment will therefore be affirmed.

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Cuyahoga County.

**JURISDICTION OF COUNCIL TO TRY OFFICERS CHARGED
WITH MISCONDUCT.**

Circuit Court of Cuyahoga County.

J. A. MASTICK V. THE VILLAGE OF LAKEWOOD ET AL.

Decided, November 28, 1910.

*Municipal Council—Power to Try Officers Charged With Certain Offenses
—Can Not Try Marshal on Charge of Malfeasance in Office.*

1. General Code, Section 4263, reserves to the council of a municipal corporation the right to try and remove both elected and appointed officers of the municipality (other than police and fire department officers and those under civil service rules), charged with bribery, nonfeasance in office, misconduct in office other than that specified in General Code, Section 4670, gross neglect of duty, gross immorality or habitual drunkenness.
2. A village council can not try the village marshal on charges of malfeasance in office filed by the mayor of the village.

Hobday & Quigley, for plaintiff in error.*E. B. Guthery*, contra.

WINCH, J.; HENRY, J., and MARVIN, J., concur.

This case was heard on appeal.

The action was brought by a tax-payer to enjoin the council of the village from trying the marshal thereof on charges filed against him by the mayor.

It is claimed that if the council formerly had power to try the marshal under Section 225 of the Municipal Code of 1902, as amended April 25, 1904 (97 O. L., 385), that power was taken away February 10, 1910, by the adoption of the General Code, which made a material change in the meaning of said section.

Said Section 225 of the Municipal Code we now find as Sections 4263 to 4267 inclusive, of the General Code.

Section 4263, General Code, reads as follows:

“The mayor shall have general supervision over each department and officer provided for in this title. When the mayor has reason to believe that the head of a department or such officer

has been guilty in the performance of his official duty of bribery, misfeasance, malfeasance, nonfeasance, misconduct in office, gross neglect of duty, gross immorality or habitual drunkenness, he shall immediately file with the council, *except when the removal of such head of department or officer is otherwise provided for*, written charges against such person setting forth in detail a statement of such alleged guilt," etc.

The balance of the section provides for service of a copy of the charges upon the person against whom the charges are made.

The following sections relate to hearing of the charges and action thereon by the council, suspension of accused pending hearing, power of council as to process, compulsory testimony and costs.

From an examination of the whole body of the municipal code we are convinced that these provisions of law apply to both elected and appointed officers of cities and villages.

The marshal of a village is an elected officer.

The words "*except when the removal of such head of department or officer is otherwise provided for*" were inserted by the code commission and adopted by the Legislature when it enacted the General Code last February.

It is claimed by defendants that these words were inserted so as to exempt officers of the police and fire departments and the chiefs thereof from trial before the council. Their removal is otherwise provided for in General Code, Sections 4379 to 4382 inclusive, which are a re-enactment of provisions on the subject theretofore in force.

But the provisions of law which now appear as Sections 4670 to 4675, General Code, inclusive, were also in existence at the same time.

Section 4670, General Code, reads as follows:

"When complaint under oath is filed with the probate judge of the county in which the municipality, or the larger part thereof is situated, by any elector of the corporation, signed and approved by four other electors thereof, charging any one or more of the following:

"That a member of the council has received, directly or indirectly, compensation for his services as councilman, committeeman, or otherwise, contrary to law; or that a member of the

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council or an officer of the corporation is or has been interested directly or indirectly in the profits of a contract, job, work, or service, or is or has been acting as, a commissioner, architect, superintendent or engineer in work undertaken or prosecuted by the corporation, contrary to law; or that a member of council or an officer of the corporation has been guilty of misfeasance or malfeasance in office, such probate judge shall forthwith issue a citation to the party charged in such complaint for his appearance before him within ten days from the filing thereof, and also furnish the accused and city solicitor with a copy thereof, but, before acting upon such complaint, such judge shall require the party complaining to furnish sufficient surety for costs."

The following sections provide as to appearance of counsel, jury, challenge of jurors, proceedings on the trial, removal of officer if found guilty and how costs shall be paid.

There can be no doubt that "an officer of the corporation" provision for whose removal by the probate judge is thus made, may be either an elected or appointed officer of a city or village.

An examination of the several provisions of law with regard to the removal of municipal officers which were in force before the code commission and the Legislature acted when the General Code was adopted, shows that council had power to remove both elected and appointed officers on charges filed by the mayor; the probate judge had power to remove both elected and appointed officers on complaint of five electors and the civil service commission had power to remove certain appointed officers.

The jurisdiction of council and probate judge was apparently concurrent as to certain matters; that the jurisdiction of the civil service commission as to the removal of police and fire department officers was also concurrent with either that of council or judge is not so apparent.

The code commission by apt, general and unambiguous words restricted the power of removal vested in council to cases not otherwise provided for.

It is said by Okey, J., in the case of *Allen v. Russell*, 39 Ohio St., 336:

"Where one or more sections of a statute are repealed and re-enacted in a different form, the fair inference is, in general, that a change in meaning was intended; though even in such a case

the intention may have been to correct a mistake or remove an obscurity in the original act, without changing its meaning. But where all the general statutes of a state, or all on a particular subject, are revised and consolidated, there is a strong presumption that the same construction which the statutes received, or, if their interpretation had been called for, would certainly have received, before revision and consolidation, should be applied to the enactment in its revised and consolidated form, although the language may have been changed. *Gardner v. Wood-year*, 1 Ohio, 170, 176; *Swasey v. Blackman*, 8 Ohio, 5, 20; *Ash v. Ash*, 9 Ohio St., 383, 387; *Tyler v. Winslow*, 15 Ohio St., 364, 368; *Williams v. State*, 35 Ohio St., 175; *Jackson v. State*, 36 Ohio St., 281, 286; *State v. Com.*, 36 Ohio St., 326; *State v. Vanderbilt*, 37 Ohio St., 590, 640; *Bishop's Written Laws* (98). Of course, if it is clear from the words that a change in substance was intended, the statute must be enforced in accordance with its changed form."

It is thought to be clear from the words used that a change in substance was intended in the statutes under consideration.

But it is said that to so conclude leads to an absurdity; that the Legislature might just as well have said to the mayors of municipalities: "We place upon you the plain duty and responsibility of filing charges before your council against officers of the municipality, and upon the council of trying these charges, but, really, you are not compelled to do anything because we have provided another method of removal of them by the probate judge and placed the responsibility of action on an elector of your municipality."

An examination of the several statutes referred to does not warrant more criticism than many statutes warrant. Section 4263, General Code, provides for removal from office by council, if they find the officer guilty in the performance of his official duty, of bribery, misfeasance, malfeasance, nonfeasance, misconduct in office, gross neglect of duty, gross immorality, or habitual drunkenness. Here are specified many grounds for removal; then follows the exception in case the removal is otherwise provided for. Looking to Section 4670, General Code, we find that the probate judge may remove an officer only when he is charged with being interested in the profits of a contract with the corporation, or with acting as commissioner, architect, superintendent

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or engineer in work undertaken or prosecuted by it, contrary to law, or with being guilty of misfeasance or malfeasance in office.

Only part of these grounds overlap in the two sections. Misfeasance and malfeasance appear in both; misconduct in office is a very general term, and probably includes some things specified in the probate judge section, but may include much more, so we conclude that under the statute, as it now reads, there is preserved to council the right to try and remove officers (other than police and fire department officers and those under civil service rules) charged with bribery, nonfeasance in office, misconduct in office other than that specified in Section 4670, General Code, gross neglect of duty, gross immorality or habitual drunkenness.

So concluding, it is necessary to examine the charges filed with council in this case in order to determine whether the marshal is charged with having been guilty of acts that are triable by council under the law as it now is, or as it was before February 10, 1910, the date of the adoption of the General Code.

The mayor says:

"I charge that the said William Frankline knowingly charged, asked, demanded and received greater fees and costs than are allowed by law for performing his official duty as marshal in cases brought in the mayor's court from August 2, 1908, to June 13, 1910, in the total sum of eight hundred and four dollars and twenty-five cents."

An itemized statement of "said cases" is attached which gives the date when some 287 cases were "brought."

The gravamen of the offense is *receiving* unlawful fees, but there is nothing to show when the marshal received greater fees and costs than those allowed by the law, and as the mayor says, "I am filing these charges with you pursuant to Sections 4262 and 4263 of the General Code of the state of Ohio," we are forced to conclude that the marshal received all these fees and costs after February 10, 1910.

The charge is plainly malfeasance in office and the offense appearing to have been committed since February 10, 1910, the council is without authority to proceed with trial on these charges.

Were the charges susceptible of division so that it appeared clearly that part of the acts complained of were committed before February 10, we would not enjoin trial as to said acts, but only as to acts committed since said date, as directed in Sections 26 and 13766, General Code. See also *Campbell v. State*, 35 Ohio St., 70, 78.

There is little reluctance in granting the relief prayed for in this case. The only question is whether a municipal council or a court of law having a judge and a jury shall try an officer charged with a most serious offense, punishable not only by the probate judge under the statutes referred to, by removal from office, but punishable also after conviction in court, by fine and imprisonment, involving also forfeiture of his office and incapacity to hold any office of honor, profit or trust for seven years thereafter. Sections 12916, 12917, General Code.

The mayor is necessarily an elector of the village and no reason appears why he should not proceed with his charges before the probate judge or by criminal process, nor why council is so jealous of its claimed prerogative, contrary to the practice of courts of law which are averse to extending their jurisdiction beyond the requirements of the law.

We have made no examination of the charge that council is prejudiced and should not try the marshal, because it is unnecessary to examine it.

The prayer of the petition is granted and injunction is allowed as prayed for.

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REMOTE CONNECTION OF WITNESS WITH CASE.

Circuit Court of Cuyahoga County.

FREDERICK W. MATHEWS ET AL V. GEORGE B. MACKEY ET AL.

Decided, November 28, 1910.

Evidence—Competency of Witness.

One who is not a necessary party to a case can not be excluded as a witness on the ground that the party objecting claims under a deceased former owner.

Carpenter, Young & Stocker, for plaintiff.

Thompson & Hine and *Horr & Lowenthal*, contra.

WINCH, J.; HENRY, J., and MARVIN, J., concur.

The petition in this case is dismissed and an injunction refused for the reasons stated by Judge Babcock when deciding the case made before him.

The only additional matter for consideration in this court is the competency of certain testimony given by Frank Cadwell, who appears as a defendant in the case.

The evidence shows that he is not a necessary party to the action. His wife, upon the happening of a certain contingency, might become the owner of the premises in dispute and he then become clothed with an inchoate right of dower therein, but such remote connection with the matter is insufficient to require his appearance as a party in the case.

It is true that plaintiffs claim under a deceased former owner, but they can not exclude witnesses at will by the convenient procedure of making them parties.

INJURY TO A BOY EMPLOYED TO RUN AN ELEVATOR.

Circuit Court of Cuyahoga County.

CHARLES SCHABER, EXECUTOR OF THE ESTATE OF JOHN SCHABER,
DECEASED, v. EDWIN DAVID HINIG, AN INFANT,
BY HIS NEXT FRIEND.

Decided, November 28, 1910.

Negligence—Master and Servant—Hiring Minor Not Proximate Cause of Injury to Him—Defect in Petition Caused by Receiving Evidence Without Objection—Minor Under Fourteen Presumed Not to Foresee Danger.

1. The fact that the owner of a building was negligent in employing a minor, who was too young to run an elevator, may render him amenable to fine under the statutes, but can not be the proximate cause of an injury to the boy himself.
2. Although a petition in a personal injury damage case is faulty in not alleging that the defendant had knowledge of the defects in certain machinery which are alleged to have caused the injury, if, without objection, evidence is introduced on this subject and the case tried as though the petition contained the proper allegations, the defect in the petition is cured.
3. The presumption is that a minor under fourteen years of age has not capacity to foresee and avoid danger.

Howland, Moffett & Niman, for plaintiff in error.

Robert Crosser and John H. Hogg, contra.

WINCH, J.; HENRY, J., and MARVIN, J., concur.

Edwin David Hinig, a minor eleven years old, was employed by John Schaber, then in his lifetime, but deceased at the time of the trial, to run an elevator in the Champ Apartment House after school hours and until half past seven o'clock in the evening. Part of his duty was to remove waste paper from the several floors in the building.

November 12, 1907, four days after he was employed, he ran the elevator to the third floor, got out there, left the door open, gathered up some waste paper and then stepped through the door, evidently expecting to step into the elevator, but it had

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passed up to the fourth floor and Edwin fell down the shaft to the bottom and was seriously injured.

The petition alleges that the elevator was out of repair in that the packing in the cylinder was insufficient, allowing it to leak, thereby permitting the elevator car to move up of itself; that the freight compartment of the elevator which Edwin was instructed to use when gathering waste paper was below the passenger compartment and was unlighted and dark; that his employer failed to warn him of the danger incident to the operation of the elevator and failed to inform him of its defective condition, and that John Schaber was negligent in employing Edwin, who was too young to operate said elevator.

Of course the last proposition, while doubtless true, rendering Schaber amenable to a fine under the statutes of this state, was not the proximate cause of the injury to Edwin.

The petition further alleges that Edwin did not know, nor by the exercise of reasonable care could he have known that the elevator was defective and had moved up from the third floor, nor did he know nor could he have known of the dangers incident to the operation of the elevator, nor of the danger due to the lack of proper lights.

There are no allegations in the petition that John Schaber knew or ought to have known of the defective condition of the elevator, or the lack of lights, but without objection, evidence was introduced on these subjects and the case tried as though the petition contained such allegations.

We think this cured the defect in the petition.

The young boy, Edwin, did not testify at the trial, because his employer had died after the accident.

There was no evidence introduced as to his capacity, except the single fact that he was eleven years old, almost twelve, at the time of the accident.

It was not shown whether he was a bright boy or a dull boy for his years. We know, however, that he was going to school and was in good health.

No eye-witness of the accident testified in the case. A young girl testified that she saw Edwin gathering waste paper on the

third floor, passed him and saw the elevator door open and the elevator car slowly going up, several feet above the level of the floor; passed the elevator, heard a scream, looked back and saw Edwin disappearing down the shaft.

Plaintiff's other witnesses as to the accident and the alleged negligence of the employer, and the girl witness as well, had all given statements to one of defendant's attorneys, shortly after the accident, which they contradicted on the trial. One of them, the janitor of the block, who had hired Edwin, admitted that he had lied about the accident to his employer, claiming that he did so in order that he might not lose his job. These three witnesses were all former employees of Schaber. One admitted that he had been discharged, charged with dishonesty. The evidence they did give on the hearing was contradictory.

The defendant offered no evidence, was unable to do so in fact, for the only persons who knew anything of the accident and the conditions surrounding it, testified for the plaintiff.

There was a substantial verdict for the plaintiff, but not more than he was entitled to, if he was entitled to anything.

With much misgiving, after a very careful examination of the record, assuming that the jury believed the witnesses who so testified, we find that there was evidence introduced at the hearing tending to establish the following facts:

That the elevator was out of repair, as alleged in the petition, and that the employer knew it; that it was not properly lighted, and this the employer knew; that the employer instructed Edwin how to operate the elevator but failed to warn him of the danger incident to its operation; that Edwin was informed that the elevator would creep up, and saw it do so, but was not informed that it would do so because of any defective condition, nor was he warned of any danger likely to result to him by reason thereof, nor was he warned of any danger to himself likely to result from the absence of a light in the freight compartment of the car. The point is made by counsel for plaintiff in error that the record shows no evidence tending to prove the allegation of the petition that Edwin ran the elevator to the third floor and stopped the freight compartment level therewith; that the car may have

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passed up because Edwin did not fully stop it and not because it was defective.

An answer to this proposition is found in the testimony of the regular day elevator boy who testified that the elevator would creep up "pretty near every time I would get off the elevator to put the baskets back," and again: "pretty near every time I would get off the elevator. If I got off the elevator for a minute, it would go up about two feet." "At the third floor it used to creep up more than it would at any other floor."

The jury, if it believed this testimony, might well have concluded that the elevator could not be brought to a complete stop at the third floor. If so, the most necessary inference to be drawn from the circumstances shown in evidence was that the elevator passed upward because of the defect in the cylinder, and not because Edwin was negligent in stopping the elevator. Again, Edwin was sent to the third floor to get the waste paper, which required him to step out of the elevator and then re-enter it. He had no warning as to the danger from the conditions incident to this work. It was the first time he had attempted to collect the waste paper and though he may have observed all the physical facts surrounding him at the time of the accident, did his immature mind grasp their significance? This question brings us to a consideration of the charge.

In one part of the charge, the trial judge said:

"Did the plaintiff, Hinig, know of the danger and appreciate it, if there was danger? In answering the question, was the elevator defective, if you say it was, then you will inquire what knowledge the boy had of this defect in the elevator. If you find from the evidence that the boy had been told that the elevator was defective, you will next consider the circumstances and the experience and age of the boy, and determine whether or not he appreciated fully the dangers which might result from such defective condition of the elevator. And if you find from the evidence that he was told about the defective condition of the elevator, yet, if you are of the opinion, from all the evidence in the case, that he did not appreciate the danger so as to take ordinary and reasonable care of himself and his own safety, he would not be guilty of contributory negligence."

Also in another part of the charge, the trial court said:

“The general rule of fixing and limiting the liability of a master to his servant applies to minors as well as to adults; and when a servant is set at a dangerous work the mere fact of his minority does not in itself render the master liable for the risk incurred, if the servant has sufficient capacity to take care of himself and knows and appreciates the risk.”

Counsel for plaintiff in error claims that the test prescribed here by the court of actual appreciation and understanding of the risk involved in operating the elevator in question, is not a correct test. That it is not a question of what the plaintiff actually understood and appreciated, but what, in view of his age and capacity, and in the light of all circumstances, he ought to have understood and appreciated.

We think the charge as an abstract proposition of law is faulty, but under the evidence in this case, did any prejudice to the rights of the plaintiff in error arise from that?

The only evidence as to the boy's capacity was that he was eleven years old. Counsel for plaintiff refrained from asking his mother, when she was on the stand, as to his mental capacity. If asked, she would doubtless have said that he was a very bright boy before he was hurt, but was dull and disabled afterward.

It is stated by Judge Spear in the case of *Railroad Co. v. Mackey*, 53 Ohio St., 370, at page 384, that the presumption that the injured person had capacity to foresee and avoid danger will not be visited upon children under the age of fourteen.

Stating this rule affirmatively and applying it to the minor in this case, it follows that the presumption is that Edwin being under fourteen years of age did not have capacity to foresee and avoid danger.

There was no evidence of equal weight or countervailing force to overcome this presumption. Hence, no matter how charged on the subject, the jury was under the duty of finding as a fact, that Edwin did not appreciate fully the dangers which might have resulted from the defective condition of the elevator.

We conclude, therefore, that there was no error in the charge prejudicial to the rights of plaintiff in error and having considered all the claims of error made by him, the judgment is affirmed.

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FAILURE TO PROVE RIGHT TO USURIOUS INTEREST.

Circuit Court of Cuyahoga County.

THE ECONOMY BUILDING & LOAN CO. v. J. R. PHILEN.

Decided, December 19, 1910.

*Building and Loan Association—Corporate Capacity and Power Denied
—Must Make Proof Thereof.*

When a building and loan association sues to foreclose a mortgage and for the collection of usurious interest on the debt thereby secured, to which it claims a right under special provisions of the statutes, and its corporate capacity is denied in the answer, it must prove that it is a corporation possessing the powers it claims, and upon its failure to make such proof judgment as to excess interest claimed should be directed against it.

Foster & Foster, for plaintiff in error.
W. T. Clark, contra.

WINCH, J.; HENRY, J., and MARVIN, J., concur.

This action was brought in the common pleas court by the company to foreclose a chattel mortgage given to it by Philen on which it claimed a balance of \$8. The verdict and judgment were for the defendant.

Various errors alleged to have occurred on the trial are set forth in the petition in error as a ground for reversal of the judgment, but we are not called upon to pass upon any assignment of error because the record discloses that in no event was the plaintiff entitled to recover; it failed to prove its corporate capacity.

The record shows that Philen borrowed \$40 of the defendant company; his note called for usurious interest, conceded to amount to 18 per cent. per annum.

This rate was claimed to be lawful under the building and loan association laws, but plaintiff failed to prove its right to benefit by said laws. The issue of *nul tiel* corporation was specially raised by the pleadings.

The record shows payment of the \$40 with interest at six per cent. even without application of payments to stop interest.

It was said in the case of *Smith v. Weed Sewing Machine Co.*, 26 O. S., 562, approved and followed in *Brady v. The National Supply Co.*, 64 O. S., 267:

“At common law a corporation, when it sues, need not set forth its title in the declaration; but if issue be taken, it must show by evidence upon the trial, that it is a body corporate, having legal authority to make the contract which it seeks to enforce, if the action be upon contract, or to sue in that character and capacity in which it appears in court.”

Not having sustained the burden cast upon it in this respect by the law, a verdict for the defendant might well have been directed, hence no prejudicial error to the plaintiff can be predicated upon the charge. No ruling of the court prevented plaintiff from offering the measure of proof required of it. It follows that the judgment must be affirmed.

“DANBURY” AS A TRADE-NAME.

Circuit Court of Cuyahoga County.

THE W. F. MASON HAT COMPANY V. M. C. ABBEY ET AL.

Decided, December 27, 1910.

Injunction—Trade-Name—“Danbury” Hats.

In an action to enjoin the use of the word “Danbury” in connection with the hat business, where the evidence shows that there are some seventy factories in Danbury, Connecticut, which manufacture hats and that hats made at all of them are called Danbury hats and have been sold by dealers generally as Danbury hats from a time antedating the establishment of plaintiff’s business, the relief prayed for will be denied.

Hidy, Klein & Harris, for plaintiff in error.

Huggett & Collins and *C. V. Hull*, contra.

WINCH, J.; HENRY, J., and MARVIN, J., concur.

Motion to dissolve restraining order.

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Plaintiff and defendant are both dealers in hats. Plaintiff has several stores in Cleveland, one of which is on East Fourth street. At all of these stores for several years plaintiff has had signs displayed reading "Mason's Danbury Hat Store," and has established a reputation in its business by the use of said trade-name, which is of great value in its business.

Defendants have recently opened a store directly opposite plaintiff's East Fourth street store and when they started business they displayed a sign reading: "This store when completed, about September 1st, will be the headquarters of the famous \$2 Danbury Hats, Union Made. The Danbury Hat Company. M. C. Abbey, H. E. Cranley."

This sign they have discontinued using, but are still advertising that they sell "Danbury hats" and have a sign displayed to that effect.

It is conceded, on the motion, that there is a town in Connecticut named "Danbury," in which there are at least thirty factories making hats; that said hats are known to the retail trade in Cleveland and other places as "Danbury" hats and have been sold, as such, by many dealers in Cleveland ever since before the plaintiff was in the hat business.

The prayer of the petition is to restrain the defendants from using the word "Danbury" in its trade-name or in its advertising.

The defendants say that they have discontinued the use of said sign, but assert their right to advertise by signs, and otherwise that they are dealing in "Danbury hats."

We think the sign first used came within the forbidden limits of unfair trade, but as defendants disclaim any intention to use said sign again, no injunction on that ground should now be granted against them.

As to the use of the word "Danbury," plaintiff claims that it uses said name indiscriminately on all the goods sold by it, without reference to the place of manufacture, in a fictitious sense, merely to indicate ownership and origin, independent of location.

Defendants claim that they use the word "Danbury" to advertise the fact that they sell hats made in Danbury.

From the affidavits on file it appears that hats made in Danbury have been sold as "Danbury" hats by dealers generally in Cleveland, from a time antedating the establishment of Mason's stores.

If such is the case, the plaintiff has not established its right to the use of the word "Danbury" as a trade-name.

The conclusion, therefore, is that the plaintiff has failed to show that it has an exclusive right to use the word "Danbury" as a trade-name in connection with its hat business and that there is no showing made that defendants threaten or intend to engage in any unfair competition in trade.

The authorities sustaining this conclusion are found in the briefs of counsel for defendants and in Chapter IX of *Nims on Unfair Business Competition*, beginning at page 226 and cases cited therein.

The motion to dissolve the restraining order is granted.

PARTIES TO CONTEST OF WILL.

Circuit Court of Wood County.

IDA MAY WALLACE ET AL V. FRANKLIN LUDWIG ET AL.

Decided, December 12, 1912.

Wills—Power and Duty of Adding Necessary Parties After Petition to Contest is Filed—Grandchildren Born After Bringing of Suit But Before Trial.

All persons interested in a will are indispensable parties to an action brought to set the instrument aside, and where grandchildren who are beneficiaries under a will are born after the filing of such an action but before trial is had, failure to make them parties by proper procedure requires that the judgment obtained in such proceeding be reversed.

N. R. Harrington, for plaintiff in error.

E. M. Fries, contra.

RICHARDS, J.; WILDMAN, J., and KINKADE, J., concur.

Error to the Court of Common Pleas of Wood County.

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The action out of which this proceeding in error grows was brought in the common pleas court by Franklin Ludwig and others to contest the will of one Isaac Ludwig, deceased. The will was executed on August 23d, 1905, at which time Isaac Ludwig was more than eighty-six years of age. He died in February, 1906, and the will was probated on April 23d of that year. At the time the will was executed and also at the time of his death he had several living children and many grandchildren. The will provides in substance that his executor shall divide one-half of the proceeds of his estate among such of his grandchildren as shall be living at the expiration of ten years from testator's death, and that the remaining half of his property shall be distributed by the executor at the expiration of twenty years from testator's death among such of testator's great grandchildren as shall then be living.

The petition was filed in the common pleas court on March 6th, 1908, and all the devisees, legatees and other interested persons then living were made parties to the action, the number of defendants being about eighty. The case was not tried in the common pleas court until May of 1912, and the four years elapsing between the commencement of the action and its trial were very fruitful, numerous additional grandchildren being born during that period. The grandchildren born after the commencement of the action were not made parties. The trial in the common pleas resulted in a verdict finding that the paper writing was not the last will and testament of Isaac Ludwig, deceased, and upon that verdict judgment has been entered.

The vital and controlling question in this case is that made by counsel for plaintiffs in error, that all of the grandchildren, living at the time the case was tried, were not made parties defendant, and that they are indispensable parties. We think this claim is in accordance with the law of Ohio. The language of Section 12080, General Code, appears to be broad enough to apply as well to legatees who are born pending the action as to those who were living at the time the action was brought. The code provides in Section 11262, that when an action can not be determined without the presence of other parties, the court may order them to be brought in or dismiss the action without pre-

judice. The only issue in a case brought to contest a will is whether the paper writing is the last will and testament of the decedent. All the grandchildren and great-grandchildren living at the time of the trial had an interest by the terms of the will contingent on their surviving to the periods named in the will and were indispensable parties to a determination of the issue. In order that there may be an end of litigation, it is requisite that all necessary parties be brought into the case. The right and power and duty to make necessary parties exists after suit brought as well as at the time of filing the petition. An interesting case shedding some light on the question at bar is *Holt v. Lamb*, 17 O. S., 375. That case has been often cited with approval and is cited by the Supreme Court in *Church v. Nelson*, 35 O. S., 630. In announcing the opinion in the latter case, White, judge, speaking for the court says:

“The effect of the decree setting aside the will was drawn in question in a collateral suit. And it was there held that the parties to the suit in which the decree was rendered were bound by the decree, that it was not void as to them; but that as to all other persons in interest the decree was void. No question arose in the case as to the decree being reversible on error. But as it was held to be void as to some of the persons in interest and binding as to others, in respect to the same property, it would seem to be necessarily erroneous as to the parties to the suit.”

Reference may be made also to *McAurthur v. Scott*, 113 U. S., 340, and to *Seldon v. Illinois Trust & Savings Bank*, 130 American State Reports 180, 186. An extensive note beginning on the latter page contains an interesting discussion of questions similar to the one now under consideration.

It was held in *Rockwell v. Blaney*, 18 Decisions, 436, that only such persons as were interested in a will at the time of its probate are proper parties. The reasoning of the court in this case was commended to our attention by counsel for defendants in error, but the case appears to have been reversed by the circuit court. See *Heimrich v. Dechant*, 21 Decisions, 107.

Guardians *ad litem* were appointed for several of the minor defendants in the trial court, and filed answers denying the averments of the petition. Some of these minor defendants

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joined in an answer in which they personally admitted the allegations of the petition filed by the plaintiff. This answer of the minors was called to the attention of the jury by counsel for the plaintiffs during the trial. The trial court declined on motion to strike the answer from the files, but did direct the jury that the defense of an infant must be made by his guardian, and that they should not be influenced by any answer which may have been filed by the minors themselves.

We do not find any prejudicial error in regard to this matter, but think it improper for counsel to have called the attention of the jury to the contents of this answer, and on re-trial the incident should not be repeated. Under the statutes, the duty rests on the party to make his case unaided by any admissions contained in an answer filed by minors, as the defense of minors must be made solely through the guardian *ad litem*, and even an admission in the answer of the guardian *ad litem* would be ineffective as an aid to the opposite party. See *Massie's Heirs v. Donaldson*, 8 O. S., 377, cited with approval, *Mills v. Dennis*, 3 John's Ch., 367.

All legatees living at the time of the trial were indispensable parties and because of the failure to make them parties, the judgment will be reversed and the case remanded for further proceedings.

LIABILITY FOR THE DEATH OF A WINDOW CLEANER.

Court of Appeals for Hamilton County.

NEAVE BUILDING COMPANY v. WILLIAM A. ROUDEBUSH,
ADMINISTRATOR.

Decided, January 17, 1914.

*Negligence—Proof Upon Which a Judgment May be Based—Must be
Either Direct as to Negligence of the Defendant—Or Must Show
Facts From Which Negligence May be Presumed.*

Where the testimony shows that the windows of the building where the accident occurred may be safely cleaned from the inside, but the decedent refused to clean them in that way, or to use a safety belt or other device to prevent falling, and had been threatened with discharge for his carelessness in that regard, and there is no direct proof of negligence on the part of the owners of the building or of facts from which negligence may reasonably be presumed, a judgment in favor of the administrator for damages will be reversed and the cause remanded for retrial.

Robertson & Buchwalter and Theo. C. Jung, for plaintiff in error.

Louis B. Sawyer, contra.

JONES, O. B., J.; JONES, E. H., J., concurs; SWING, P. J., not sitting.

The action in the court below was brought by William A. Roudebush as administrator of Clarence Henson, deceased, for damages on account of the alleged wrongful death of said Clarence Henson on the 6th day of January, 1911.

The deceased was in the employ of the Neave Building Company as window washer and helper in the building. The trial below resulted in a verdict and judgment in favor of the plaintiff, from which error is prosecuted to this court by the defendant. Three grounds of negligence were complained of in the petition below: first, that the deceased was ordered to wash windows at a time when the window sills were covered with snow, which made the cleaning of said windows very difficult and dangerous on said day; second, that the defendant failed to comply with the

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city ordinance requiring windows above the second floor to be equipped with safety devices, or to provide in any manner for the safety of plaintiff's intestate while engaged in said dangerous occupation, or to provide any safety device whatever to prevent injuries to said intestate engaged in cleaning said windows on the outside; and third, that defendant failed to employ sufficient help so as to give deceased sufficient time to safely clean its windows on the outside. The court excluded this third ground of negligence entirely from the case.

Section 505 of the Ordinances of Cincinnati was introduced, by which it is provided:

"In every fireproof or semi-fireproof building now in existence or hereafter erected, every window above the second story thereof shall be equipped with a suitable device which will permit the cleaning of the exterior of such windows without endangering life and limb. Provided, however, that such device need not be placed on any window that can be easily cleaned from within."

Evidence was introduced to show, first, that the windows of said building could be easily cleaned from within by standing on the sill inside and reaching over to clean the top part of each window sash on the outside and by sitting in the window to clean the bottom part of each of the sashes on the outside. There was evidence on the part of the plaintiff that this could not easily be done, and on the part of the defendant that it might be so cleaned. A device consisting of a platform to be placed on the window sill and fastened by screws, to be moved from one window to another as the cleaning progressed, was introduced by the defendant, and there is no question but that plaintiff's intestate had opportunity to use it had he so desired, but the testimony of the superintendent of the building was to the effect that he had declined to use it and had also declined the proffer of a safety belt which said superintendent had offered to get for his use, stating that he did not desire to be bothered with either. There is also testimony to show that there was a rule of the building company providing that no employe should stand on the sills for the purpose of washing windows, which were to be washed from the inside, and that plaintiff was ad-

vised of this rule and threatened with discharge if he violated it.

The court is of the opinion, that there is not sufficient evidence to show that the death of the deceased was attributable to any negligence of the defendant. There is no evidence to show that the decedent fell from the window. The bucket, rag and chamois were found in Room 203 of the building, and a footprint was seen in the snow on the window sill of a window in that room, but there is no testimony to show that that window was open or that it had in any way been washed on that day, nor is there any testimony to show that the decedent fell upon the sidewalk. The only evidence is that he was found in the lobby of the building, or was brought in the lobby and placed in a chair. As to how he received his injury is a pure matter of conjecture. Whether he fell from a window, purposely jumped from a window, or whether he fell down the stairs or down an elevator shaft is a matter of speculation and not of proof.

There is no evidence to show whether the snow that was on the window sill was hard and slippery or whether it was soft and not dangerous, nor is there any evidence to show whether he had been seated on that sill, or whether the footprint on there was his footprint or that of someone else.

In this state of the evidence the court must find that the verdict and judgment below is not sustained by the evidence. While it is true that an allegation of fact may be established by circumstantial evidence, the circumstances to have that effect must be such as to make the fact alleged appear more probable than any other. The fact in issue must be the most natural sequence from the facts proved.

To establish negligence there should be either direct proof of facts constituting such negligence, or proof of facts from which the negligence may be reasonably presumed. There should be no guessing by either court or jury. *R. R. Co. v. Marsh*, 63 O. S., 236; *R. R. Co. v. Andrews*, 58 O. S., 426; *Crawford v. R. R. Co.*, 3 C.C.(N.S.), 144; *Derby v. Fireworks Co.*, 12 C. C., 420; *Hunt v. Caldwell*, 22 C. C., 283.

The judgment below will therefore be reversed, and the case remanded for a new trial.

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STOCKHOLDER MAY SET UP DEFENSE FOR COMPANY.

Circuit Court of Cuyahoga County.

THE BUCKEYE GARAGE & SALES COMPANY AND L. C. YOUNG v.
WILLIAM K. CALDWELL.

Decided, December 27, 1910.

Corporations—Right of Stockholder to Intervene and Defend Case for Company—Professional Statements of Counsel—Striking Demurrable Pleading From Files.

1. A stockholder who alleges that his company has a valid defense to a suit brought against it, but which managing officers wilfully and fraudulently refuse to make, will be allowed to intervene in the suit and defend for the company upon his tender of an answer stating valid matters of defense to the action and the making of a showing by evidence of reasonable grounds to believe that such defense can be finally proved upon a trial of the case, and that the officers whose duty it is to make it are wrongfully and fraudulently refusing to do so.
2. Professional statements by reputable attorneys are sufficient evidence of good faith and warrant the granting of leave to become a party to a suit and to file or amend pleadings.
3. Because a pleading is demurrable is no ground for striking it from the files; the proper practice is to consider the motion as a demurrer, grant it and then give leave to amend, if desired and proper.

Calfee & Fogg, for plaintiffs in error.

Caldwell & Younger, contra.

WINCH, J.; HENRY, J., and MARVIN, J., concur.

A petition was filed in the common pleas court July 5, 1910, by Caldwell against the Buckeye company, setting up a judgment obtained by him against it in a justice court, and execution thereon returned unsatisfied, and praying for a receiver of the company to collect and distribute its assets to its creditors, including the plaintiff.

On the same day an answer to this petition was filed by W. R. Winn, as attorney for the company, sworn to by George E. Sherer as treasurer thereof, admitting the allegations of the

petition and consenting to the appointment of a receiver as prayed for.

Thereafter, on August 5, 1910, one L. C. Young was given leave to become a party defendant and file an answer and cross-petition by August 9, 1910, which he did file on August 6, 1910.

This answer and cross-petition set forth that Young was the president and a director of the company and owner of approximately one-half of the capital stock thereof; that Caldwell was attorney for certain other directors and stockholders, who, for the purpose of obtaining a receiver to take charge of the business so as to prevent Young and other stockholders from participating in the control of the business, caused the plaintiff to file a suit against the company before a justice of the peace, asking for judgment in the sum of \$100 alleged to be due Caldwell for legal services rendered the company; that no summons was served upon the company; that an attorney without any authority from it entered the company's appearance and permitted judgment to be rendered against it; that all this was done without Young's knowledge; that thereupon plaintiff commenced this action for a receiver and the answer purporting to be the answer of the company was filed without the knowledge of Young; that no meeting of the board of directors was held to authorize or approve such action.

The answer then denies that Caldwell ever rendered any services to the company or that it was insolvent, and makes further allegations of a conspiracy between Sherer and other stockholders to freeze Young out of the company.

The prayer of the answer is that the receiver be dismissed and that the answer of the company be stricken from the files.

On August 10, this answer of Young was stricken from the files and he was also refused leave to file an amended answer and cross-petition setting up the further fact that he filed it in behalf of himself and all other stockholders similarly situated and more fully setting forth facts tending to prove a conspiracy between Scherer and two other directors to ruin the company for the purpose of getting rid of Young. It also alleged that no demand had been made upon the board of directors for the re-

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lief therein prayed for because three of the five directors of the company were concerned in the fraudulent scheme set forth and were actively assisting in carrying it out.

To the order striking Young's answer and cross-petition from the files and refusing him leave to file his amended answer, exception was taken and a bill of exceptions is filed in this court showing that the only evidence before the court when it made these orders was the amended answer itself, sworn to by Young as being true to the best of his knowledge and belief, and certain statements of his counsel tending to show his confident belief that he could establish the truth of its allegations by competent evidence, and counter statements of the plaintiff, a lawyer, but not under oath.

The law applicable to this case appears to be fairly stated by counsel for defendant in error as follows:

"The rule is that a stockholder, who alleges that his company has a valid defense to a suit brought against it but which managing officers wilfully and fraudulently refuse to make, will be allowed to intervene in the suit and defend for the company upon his tender of an answer stating valid matters of defense to the action and the making of a showing by evidence of reasonable grounds to believe that such defense can be finally proved upon a trial of the case and that the officers whose duty it is to make it are wrongfully and fraudulently refusing to do so. *Thompson on Cor.* (2d Ed.), Vol. 4, Section 4560; *Fitzwater v. Bank*, 62 Kan., 167."

It is presumed that this rule was complied with when leave was granted to Young on August 5, 1910, to become a party defendant and file an answer and cross-petition. The claim that the record does not show this is not important. The record does not show what evidence induced the court to grant the leave requested, but every reasonable intendment must be made in support of the judgment and so it is presumed that the court acted upon a sufficient showing.

That the first answer filed by Young was demurrable, may be conceded. It failed to show that he brought the action not only for himself but for all other stockholders similarly situated and it failed to show that he had called upon the company to defend the action and been refused, or that such demand was use-

less, because the controlling officers of the company would necessarily be antagonistic to the defense prepared.

But because a pleading is demurrable is no reason for striking it from the files; it would seem that the proper practice would be to consider the motion as a demurrer, grant it and then give leave to amend, if desired and proper.

Of course motions for leave to amend are addressed to the sound discretion of the court, but in this case the applicant for leave presented a perfectly good answer, and his attorney, an officer of the court, represented that he expected to be able to sustain all its allegations by evidence. It would seem, then, to be a clear abuse of discretion to refuse leave to file such an amended pleading.

Should we be wrong in holding that there was error in striking Young's first answer from the files, still it appears that his application for leave to file an amended answer within the rule claimed entitled him to file the pleading.

He tendered an answer stating valid matters of defense to the action and made a showing, by evidence, of reasonable grounds to believe that such defense could be finally proved upon trial of the case and that the officers whose duty it was to make it were wrongfully and fraudulently refusing to do so.

He was only required to make a *prima facie* showing of these facts, not prove them, as upon trial. His evidence was the answer itself, duly sworn to by Young, not absolutely as an affidavit, but sufficiently for the *prima facie* purpose required.

His counsel stated professionally his belief that he could sustain the allegations of the answer by evidence.

Such professional statements by reputable attorneys have always been received by the courts as sufficient evidence of good faith and as warranting the granting of leave to become a party to a suit and to file or amend pleadings.

No precedent to the contrary has been cited. No intimation has been made that Young's counsel is not of the best repute. Indeed we know he is.

For the reasons stated the orders striking Young's answer from the files and refusing leave to file his amended answer are reversed and the cause is remanded for further proceedings according to law.

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ACTION TO COLLECT UNPAID STOCK SUBSCRIPTIONS.

Circuit Court of Cuyahoga County.

H. O. YODER v. LEWIS HOYT.

Decided, December 27, 1910.

Corporations—Stock Subscription—Fraud as a Defense—Bankruptcy of Corporation.

Fraud may be pleaded as a defense in an action to recover unpaid stock subscriptions, even after bankruptcy of the corporation, if no debts of the corporation were contracted after the subscription.

H. O. Yoder, for plaintiff in error.*C. W. Dille* and *H. C. Boyd*, contra.

WINCH, J.; HENRY, J., and MARVIN, J., concur.

This was an action brought by H. O. Yoder to collect unpaid stock subscriptions. The amended answer sets up fraud and misrepresentation in obtaining the subscription and an excess issue of stock.

A demurrer to this answer was overruled and judgment entered for the defendant. This ruling is here assigned as error.

The demurrer to the answer of course searches the record and it is therefore proper to first examine the amended petition to see if it is sufficient.

It alleges that the corporation involved was adjudicated a bankrupt on May 20, 1907, a receiver appointed to take possession of its assets, the appointment of a trustee to whom the receiver turned over the assets; the subscription on March 29, 1907, of the defendant for twenty-five shares of preferred stock of the company of the par value of \$10 per share; the payment by him of \$125 on account of his subscription and that a balance of \$125 with six per cent. interest is still due thereon.

It is further alleged that at the time of filing the proceedings in bankruptcy, \$48,249.04 of provable debts of the company existed which were proved and allowed; that \$18,734.60 dividends had been paid, leaving more than \$29,000 of valid liabil-

ities unpaid after exhausting all the assets of the company, except a balance due on certain stock subscriptions.

It is further alleged that said unpaid subscriptions including that of defendant, were duly sold at auction by the trustee to the plaintiff who paid a valuable consideration therefor, which sale was approved and confirmed by the referee in bankruptcy and the United States District Court and bill of sale therefore ordered and made to the plaintiff. It is also alleged that the amount of said unpaid subscriptions sold to plaintiff are much less than the unpaid liabilities of the company after the application thereto of the sum realized from the sale of said unpaid subscriptions.

There is no allegation in the amended petition that the rights of any creditors of the corporation accrued *after the subscription* of the defendant, or that any debts were contracted by the corporation upon the faith or credit thereof.

The absence of this allegation from the petition appears to be fatal to it.

The answer of the defendant would certainly be good if made in an action brought by the corporation itself, before insolvency.

The rule that fraud can not be pleaded as a defense in an action to recover unpaid stock subscriptions, after bankruptcy and after the rights of creditors have intervened is based upon the doctrine of estoppel.

Likewise a stockholder is estopped from setting up a defense that the stock is invalid, if the company is in bankruptcy and valid debts were contracted *after his subscription*.

The pleadings in this case do not show that any debts were contracted by the corporation after defendant's subscription. The estoppel, therefore, does not arise and the answer is good.

There are some cases which seem to hold that the *defendant* must plead and prove that the estoppel does not apply because no debts were contracted after he subscribed, but it is thought that the better practice is for the plaintiff to make out a complete case, including the estoppel, before the defendant is required to answer, for the answer is good in the absence of the estoppel.

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This case illustrates the thought.

The petition shows that the defendant subscribed March 29th, and that bankruptcy proceedings were begun May 20. The answer alleges that the corporation was insolvent March 29th. If so, the natural presumption is that no debts were contracted between the two dates.

Judgment affirmed.

ACTION TO ENJOIN TRIAL OF A SCHOOL TEACHER.

Circuit Court of Cuyahoga County.

J. M. H. FREDERICK V. THE BOARD OF EDUCATION OF
LAKEWOOD ET AL.

Decided, December 27, 1910.

Constitutional Law—School Board May Try School Teacher—Court of Equity Will Not Interfere.

1. The power conferred upon school boards, by General Code, Section 7701, to dismiss any appointee or teacher for cause, after hearing, is administrative and not judicial in its nature, and so not unconstitutional.
2. A court of equity is without jurisdiction to interfere by injunction to prevent the trial and dismissal of a school teacher by a school board because to do so in advance of its action would be to invade the functions of the executive or administrative department, and after such action the remedy for erroneous proceedings lies with a court of law.

John J. Sullivan, for plaintiff.

Edwin G. Guthery, contra.

WINCH, J.; HENRY, J., and MARVIN, J., concur.

This action was brought to enjoin the defendants from trying the plaintiff, superintendent of and a teacher in the public schools of Lakewood, on charges involving improper conduct, pursuant to authority for such trial found in Section 7701 of the General Code.

The right to an injunction is based upon two grounds: first, that the board of education, by the preparation, filing and serving of written charges and notices, are attempting to assume judicial functions, and second, that the plaintiff can not have a fair trial for the reason that two of the five members of the board signed the charges, setting forth that they believed the plaintiff guilty of improper conduct and will sit in judgment upon the evidence when it is produced upon the hearing, and that one of the other three members is a necessary and unfriendly witness in the matter. That the first ground is untenable see *State, ex rel, v. Hawkins*, 44 Ohio St., 98.

The second ground naturally looms large to the judicial eye for the reasons so forcefully and cogently presented to the court by the learned counsel for the plaintiff. It is a principle of natural justice that no man should sit in as judge in his own cause, nor should any man sit in judgment of a cause which he has prejudged.

By the pleadings in this cause it is conceded that certain of the defendants, perhaps a majority of the board, are about to violate both of these principles.

But it seems that a court of equity is without jurisdiction to interfere by injunction to prevent the trial and dismissal of public officers or appointees because to do so in advance of executive action would be to invade the functions of the executive department, and after such action the remedy for erroneous proceedings lies with the court of law and not with the chancellor. 2 *High on Injunctions*, 1311, 1312, 1313; *Marshall v. State Reformatory*, 201 Ill., 1; *Cox v. Moores*, 55 Neb., 34; *In re Sawyer*, 124 U. S., 200; *White v. Berry*, 171 U. S., 366; *Delahanty v. Warner*, 75 Ill., 185; *Muhler v. Hedikin*, 119 Ind., 481; *District Township v. Barrett*, 47 Iowa, 110.

The restraining order is dissolved and the petition is dismissed.

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RIGHTS OF PURCHASERS OF AN INSURANCE AGENCY.

Circuit Court of Franklin County.

**THE BRYSON-BEDWELL-BREUBACHER COMPANY V. J. J. ARCHER
ET AL; THREE CASES.***

Decided, February 6, 1912.

*Good Will—Can Not be Augmented Through Custom to Build up
Rights Inconsistent with the Principle of Agency—Custom among
Fire Insurance Agencies.*

The purchasers of a fire insurance agency, with a covenant that the vendors will not engage in a competitive business for a period of years, can not bind by a custom as to the control of information with reference to expiration of policies, and thereby restrict the rights of others who were not parties to the contract of purchase and sale.

Huggins, Huggins & Hoover, for plaintiff in error.
J. W. Mooney, contra.

ALLREAD, J.; DUSTIN, J., and FERNEDING, J., concur.

The plaintiffs in error, who were also plaintiffs below, are a local fire insurance agency, and allege that they purchased of the O'Kane-Beeson Agency of Columbus, Ohio, for a full and valuable consideration, its policy expirations, business, books and good-will, with a covenant that the vendors would not engage in competitive business for a period of five years.

The plaintiffs allege that the defendant, Archer, in the first two cases, and Lewis in the third, have been appointed agents by the respective insurance companies, and are, by use of knowledge of existence and expiration of policies obtained from the books of the respective insurance companies, interfering with and attempting to secure renewals of policies in violation of the agreement in the transfer of the business of the O'Kane-Beeson Agency. Neither the insurance companies, nor Archer and Lewis, are parties to any contract with the plaintiff. They are, however, sought to be bound by a custom by which local agencies

*Affirmed by Supreme Court without opinion.

in Columbus and elsewhere are permitted to own and control the information as to the expiration of policies and to hold the exclusive right to use such information and solicit renewals. It is also asserted that the plaintiff in making the purchase relied upon this custom.

The court of common pleas sustained a demurrer to the amended petition stating the above facts and rendered final judgment for the defendants.

The questions presented by the petition in error are interesting and important. Counsel for the respective parties have very fully argued the questions involved and have cited and discussed many authorities.

We are clearly of opinion that exclusive of the averments as to custom and usage the amended petition does not state a good cause of action. We concur fully in the opinion of the trial judge upon the demurrer to the original petition.

The most difficult question presented arises upon consideration of the effect of the added averments as to custom. Contracts as to good-will incident to a sale of business, while subject to certain rigid tests, are, if those tests are fully met, sustainable under repeated decisions of the Supreme Court. The tests of legality of such contracts is defined by Judge Ranney in the opinion in *Lange v. Werk*, 2 O. S., 520. There is no doubt, therefore, of the validity of the transfer of the good-will of the local agency.

The question is whether the good-will of the local agency can be augmented through custom so as to include a restriction against the principal from the use of books and information in the principal's custody relating to the business of the principal. It has been repeatedly held that usage and custom can not be employed to take the place of contract nor to create property rights. This principle is laid down by Caldwell, J., in the opinion in *Inglebright v. Hammond*, 19 Ohio, 344, as follows:

“Evidence of custom may properly be given to explain and give the proper effect to the contracts and acts of parties; but it would be carrying the doctrine too far to permit a custom to change the title to property contrary to an established rule of law.”

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The same principle is fully established in the cases of *C. & H. C. & I. Co. v. Tucker*, 48 O. S., 41, and *Thomas v. Trust Co.*, 81 O. S., 432. In the syllabus in the last case the rule is stated as follows:

“Usage or custom can not create a contract or liability where none otherwise exists. A usage or custom can only be used to explain or aid in the interpretation of a contract or liability existing independently of it.”

The plaintiffs, having no contract relation with the insurance companies, can not by force of custom and usage assert a right to enforce a restriction upon the insurance companies in the carrying on of their business and the use of information founded upon books and records in their possession.

It is urged that the usage and custom can be applied to enlarge the agency contract between the insurance companies and the O’Kane-Beeson Agency, thereby enabling the latter to transfer the enlarged good-will.

It must be kept in mind, however, that the O’Kane-Beeson Agency were agents, and that they can not, therefore, by usage and custom build up rights inconsistent with the principle of agency. The doctrine of agency and the respective rights of the parties are established by the general principles of the common law and made more effective as applied to insurance companies by statutory provision.

The custom and usage set forth in the amended petition is in our opinion inconsistent with the common law and statutory principles of agency and unduly restrictive of the rights and franchise of the principals. *Merchants Ins. Co. v. Prince*, 50 Minn., 53; *Dempsey v. Dobson*, 184 Pa. St., 583; *Castleman v. Southern Mut. Life Ins. Co.*, 14 Bush (Ky.), 197.

The learned counsel for plaintiffs in error do not deny the right of the principals to revoke the authority of the agent, but their contention would have the effect after revocation of retaining substantial rights as against the principal, which, we think, is equally inconsistent with the common law and statutory principles of agency.

The alleged custom not being valid to restrict the principals in the use of their own books in obtaining business and being contrary to established principles of the law, the plaintiffs had no right to rely thereon and can claim nothing by way of estoppel.

The judgments of the court of common pleas will, therefore, be affirmed.

**WRONG INTERPRETATION AS TO LIABILITY CAN NOT
BE PLEADED.**

Circuit Court of Cuyahoga County.

J. S. FISHER v. DAN STANISIC.

Decided, February 27, 1911.

*Replevin Bond—Liability Extends to Final Determination of Case in
Court of Review—Estoppel.*

1. A surety on a redelivery bond in replevin is bound until "the final determination of the action," and this means until the action and all reviews of it authorized by law, have been finally determined.
2. A wrong interpretation of the legal liability of a surety on a bond given by a justice of the peace to the surety, before he signs the bond, in the presence of the person for whose benefit the bond is given, and to which interpretation said person assents, can not be pleaded in an action on the bond as an estoppel or bar to said action.

Bentley, McCrystal & Arnos, for plaintiff in error.

F. C. Friend, contra.

WINCH, J.; HENRY, J., and MARVIN, J., concur.

Plaintiff in error was surety on the re-delivery bond of one George Skelley, defendant in replevin before a justice of the peace. Stanisic was plaintiff in the case.

The bond was conditioned, in accordance with General Code, 10469 "that he (the defendant) will safely keep the property and in case the judgment be against him, then return it, or pay the value so assessed, at the election of the plaintiff, and also

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pay the damages assessed for the taking, detention and injury of the property, and costs of suit.”

The judgment before the justice was for the defendant, whereupon the plaintiff appealed the case to common pleas court, where judgment was rendered for the plaintiff.

Thereupon Fisher, the surety, pursuant to General Code, 12060, was notified to appear and show cause why judgment should not be entered against him for breach of the bond.

He filed answer, or response to the notice, which, on demurrer, was held insufficient; thereafter judgment was duly entered against him, and he now asks this court to review the sufficiency of his said answer.

There are two parts to this answer:

1. The first paragraph alleges that the bond became void by its own terms and in law, when the justice determined the case in favor of the defendant.

This point is not well taken. The statute itself provides that upon the defendant giving bond the property shall be returned by the officer to the defendant, to be retained by him until the determination of the action.” That means final determination and an action is not finally determined until all reviews authorized by law have been exhausted. As said by Judge Minshall in the case of *Richardson v. Bank*, 57 O. S., 299, at page 309: “By signing the undertaking he became a *quasi* party to the suit, and is held to have notice of all the proceedings thereafter in the suit that may affect his liability on the undertaking.”

The bond was executed in reference to all the statutes in force at the time, including the statute authorizing appeals to the common pleas court, and that statute is to be read into the bond.

2. The second paragraph of the answer is as follows:

“He further says that before he signed said undertaking he applied to said justice in the presence of said plaintiff to inform him what said undertaking would mean and what liabilities he would incur by signing same and said justice then told him in the presence of the plaintiff that said undertaking provides that he would be responsible that said property should be on hand at said trial, and that if said case should be decided by said justice in favor of the plaintiff said property must be there to respond to said judgment and that that was all the

liability which said Fisher would assume and thereupon said justice then and there asked plaintiff if that would be satisfactory to him and said plaintiff thereupon responded in the presence of said Fisher that that would be satisfactory to him and that that was all he wanted, and thereupon said Fisher relying on said assurance and agreement, signed said undertaking and otherwise he would not have done as the plaintiff then and there well knew; and said Fisher further says that said property was on hand at said place of trial to respond to said judgment. He further says that said plaintiff is estopped from prosecuting this motion against Fisher."

The facts here pleaded do not amount to an estoppel. As said in the case of *Henshaw v. Bissell*, 18 Wall., 255, 271:

"An estoppel *in pais* is sometimes said to be a moral question. Certain it is that to the enforcement of an estoppel of this character, such as will prevent a party from asserting his legal rights to property, there must generally be some degree of turpitude in his character which has misled others to their injury.

"Conduct or declarations founded upon ignorance of one's rights have no such ingredient and seldom work any such result. There must be some intended deception in the conduct or declarations in the party to be estopped, or such gross negligence on his part as to amount to constructive fraud."

No intended deception is pleaded here; at most, the justice is said to have given poor advice as to the law, which the plaintiff and defendant accepted; it is not said that the plaintiff knew the law to be otherwise. Indeed, it is likely the subject of the liability on the bond in case of an appeal was not discussed, and the plaintiff's attention not being challenged to that contingency, it follows that he was guilty of no deception regarding it.

Nor have we a case of contract here; the contract was in writing and is not to be varied by the equivocal language said to have been used.

Bigelow on Estoppel (5th Ed.), 773, says:

"The rule we apprehend to be this: 'That when the statement or conduct is not resolved into a statement of fact, as distinguished from a statement of opinion or of law, and does not amount to a contract, the party making it is not bound, unless

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he stood in a relation of confidence toward him to whom it was made. If the statement, not being contracted to be true, is understood to be opinion, or a conclusion of law from a comparison of the facts, propositions or the like, and *a fortiori* if it is the deduction of a supposed rule of law, the party may, with the qualification stated in the last sentence, allege its incorrectness.' "

Judgment affirmed.

PROMISSORY NOTE SIGNED BY INDIVIDUALS BUT FOR CORPORATION.

Circuit Court of Cuyahoga County.

ROBERT E. MCKISSON v. R. S. THOMAS.

Decided, March 20, 1911.

Promissory Notes—Individuals Signing as Syndicate Managers, Liable—Collateral Security Must First be Applied.

1. A promissory note reading: "we promise to pay," etc., and signed, "H. E. Everett, David Morrison, R. E. McKisson, as syndicate managers of the Cleveland Hippodrome Company," is the joint note of the individuals named.
2. A note with collateral security which provides, "In default of payment of this note, said collateral shall be applied on the payment of said note, or any part thereof, by the then owner of this note," requires the holder of the note to sell the stock, or apply it in reduction of the debt, if the debt is not paid at maturity, before bringing suit against the makers of the note.

R. E. McKisson, for plaintiff in error.

Smith, Taft & Arter, contra.

WINCH, J.; HENRY, J., and MARVIN, J., concur.

This was an action on a promissory note signed as follows: "H. A. Everett, David Morrison, R. E. McKisson, as syndicate managers of the Cleveland Hippodrome Company"; the body of the note reads: "we promise to pay," etc.

Judgment was against the makers of the note as individuals; plaintiff claims that the judgment should have been against the

Cleveland Hippodrome Company, which he says, was intended to be bound by the signatures.

We find no error in the judgment on this score. *General Code of Ohio*, Section 8125; *Titus v. Kyle*, 10 Ohio St., 444; *Collins v. Ins. Co.*, 17 Ohio St., 215; *Anderson v. Shoup, Trustee*, 17 Ohio St., 125; *Bank v. Cook*, 38 Ohio St., 442; *Robinson v. Bank*, 44 Ohio St., 441; *Reiff v. Mulholland*, 65 Ohio St., 178.

A certificate for one hundred shares of the preferred stock of the Cleveland Hippodrome Company was pledged as collateral security to the note, which also contained the following words: "In default of payment of this note, said certificate of preferred stock *shall* be applied, on the payment of said note, or any part thereof, by the then owner of this note."

The petition alleged that said stock was worthless, but the answer denied it. No evidence on this issue was introduced.

We think the holder of the note, by the clause quoted, was under obligation to sell the stock, or apply it in reduction of the debt, if the debt was not paid at the maturity of the note, before suit could be brought against the makers thereof. The language here used is mandatory, and thus distinguishes this case from the case of *Lake v. Trust Co.*, 3 L. R. A. (N. S.), 1199, cited by counsel for defendant in error.

For this error the judgment will be reversed and the cause remanded for new trial, but not until the petition in error is amended by bringing in all parties to the judgment below as defendants in error in this court. The judgment below was a joint judgment and can not be reversed as to one of the defendants below without being reversed as to all of them.

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**UNSUCCESSFUL EFFORT OF MINOR TO RECOVER MONEY
PAID FOR STOCK.**

Circuit Court of Cuyahoga County.

WALTER STONE, BY J. N. STONE, HIS NEXT FRIEND, v. S. B.
SANDERS ET AL.

Decided, March 20, 1911.

Variance.

An action to recover money paid by a minor to defendants for stock sold him by them is not sustained by evidence that the defendants, as brokers, purchased the stock for him, on commission, from others.

Hart, Canfield & Croke, for plaintiff.

Squire, Sanders & Dempsey, contra.

WINCH, J.; HENRY, J., and MARVIN, J., concur.

This was an action brought on behalf of a minor to recover for him some \$600 which he had paid for certain shares of stock which he claimed the defendants had sold him. On the trial it was shown that defendants were brokers and had not themselves sold the stock to the minor, but had purchased it for him, on commission, from others. Verdict was directed for defendants. This was right; the variance between the allegations and proof was material and fatal.

Judgment affirmed.

APPROPRIATION OF LAND UNDER LEASE.

Circuit Court of Cuyahoga County.

GEORGE BATTERMAN ET AL V. CITY OF CLEVELAND.

Decided, March 20, 1911.

Appropriation of Leasehold Interest—Separate Finding for Landlord and Tenant—Map Evidence of Possible Special Benefits—Value of Buildings.

1. In an appropriation proceeding brought by a municipal corporation against a landlord and his tenant, each is entitled to a separate finding and a separate review of that finding.
2. A map which shows that by reason of the contemplated improvement new lines of travel past a store will be opened up, which may offset some loss of trade from the old travel, is sufficient evidence to warrant a charge that the measure of damages to property not taken may be reduced by special benefits, if any, which may be found to accrue from the improvement.
3. In an appropriation of a tenant's interest in lands, value of the buildings on the part not taken may be given in evidence, though the tenant has a right to remove them at the termination of the lease.

Patterson & Neiding, for plaintiff in error.

Newton D. Baker, contra.

WINCH, J.; HENRY, J., and MARVIN, J., concur.

The city of Cleveland began proceedings in the Insolvency Court of Cuyahoga County to appropriate certain lands for approaches to a new bridge over the Nickel Plate tracks on West 25th street in the city of Cleveland and for the assessment of damages to those injured by the improvement. The Battersmans had a lease of two buildings on land owned by David Morison, abutting the improvement, and both landlord and tenant were made defendants in the action.

The jury was instructed to find separately for the landlord and his tenants, which they did, and the latter are here with a separate petition in error complaining of the award to them.

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We think they were entitled to a separate finding and are properly before this court without bringing with them their landlord. *Gluck v. City of Baltimore*, 81 Md., 315; *Trustees, etc., v. Wm. Irving Clark*, 137 N. Y., 95; *Stuffins v. Village of Cranston*, 11 L. R. A., 839.

The verdict in favor of the Battermans was in the sum of \$800; it is claimed that the uncontradicted evidence presented to the jury required a verdict of at least \$1,800.

It is true that the Battermans' witnesses testified that the damage was that much or more, but the city, while it offered no witness who gave different figures, did place in evidence a map which showed that new lines of travel past the Battermans' store would be opened up, which might offset some loss of trade from the old travel. This was sufficient evidence to warrant a charge that the measure of plaintiffs in error's damages to property not taken might be reduced by special benefits, if any were found to accrue to them from the improvement, as provided by law.

We are unable to say that the verdict was inadequate, or unsupported by the evidence. The good sense of twelve men upon this subject is not lightly to be set aside, in the absence of any showing of passion or prejudice.

There was no error in admitting evidence as to the value of the buildings, although the tenants had a right to remove them at the end of their five years' lease. Of course the measure of damages, as charged by the court, was the difference between the rental value of the premises before and after the improvement; that is, the diminution in the value of the leasehold. Value of the buildings might throw some light upon their rental value, although it would not be conclusive. We see no prejudicial error in admitting this evidence.

We are unable to say that any error intervened by the exclusion of an answer to a question asked of a witness for the Battermans, for there was no offer to prove what the witness would testify to.

Judgment affirmed.

**INJURY TO EYE BY A PIECE OF GRAVEL THROWN BY
A FAST TRAIN.**

Circuit Court of Cuyahoga County.

ERIE RAILROAD COMPANY v. SAM CIOFALO.*

Decided, March 20, 1911.

Employee of Railroad Injured by Stone Thrown by Passing Train—Inconsistencies in Testimony—Bill of Exceptions.

1. A laborer on a railroad may recover damages for injuries to his eye caused by a stone or cinder thrown or shot into it by a fast passenger train, from a pile negligently left between the rails where he was working.
2. Inconsistencies may occur in the testimony of truthful witnesses; it is for the jury to reconcile them.
3. A trial judge may make such annotations and corrections on a bill of exceptions as, in his judgment, it requires.

Cushing, Siddall & Palmer, for plaintiff in error.

Harry F. Payer, contra.

WINCH, J.; HENRY, J., and MARVIN, J.. concur.

This was a personal injury damage case in which Ciofalo, a laborer on the road, recovered damages for injuries to his eye which he claimed were occasioned by a stone or cinder thrown or shot into it by a fast passenger train from a pile negligently left between the rails where he was working.

Counsel for plaintiff in error has given us a very full brief on the evidence introduced at the trial which has been carefully examined, as well as the record. There are some contradictions in the testimony of different witnesses, but the plaintiff himself sustained his claim by his own testimony, and we see no reason for upsetting the verdict on the weight of the evidence.

The railroad company claimed that Ciofalo had a bad eye and had been seen with a bandage over it sometime before the day on which he claimed that he was injured. What of that? It

*Affirmed without opinion, *Erie Railroad Co. v. Ciofalo*, 86 Ohio State, 322.

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is shown by his doctor that at this time he had a laceration of the eye and Dr. Burke testified to a recent scar. It is fate that one always gets hurt in his tender spot. A good eye might have closed in time to avert the damage. The verdict was not large.

It is claimed that one witness for plaintiff, Joe Granato, who testified that he was present when Ciofalo was hurt, could not have been present on that day. Perhaps Ciofalo was mistaken as to the date of the accident. His doctor could not give the exact date and the plaintiff was an ignorant foreigner.

Ciofalo says Granato was with him on the same side of the track, when the passenger train went by. He says he was on the south side of the track; Granato says he was on the north side of the track. One or the other is mistaken. What of it? They both claim they were together.

Other inconsistencies in the testimony are pointed out, but they have not impressed us as graver than those usually found in the testimony of truthful witnesses.

Complaints made regarding a want of certain allegations in the petition, are not verified upon an examination of it, and criticisms of the charge, though numerous, are not grave. We find no prejudicial error in it.

We also think the trial judge had a right to make such annotations on the bill of exceptions as in his judgment it required. We find none, however, that prejudice the rights of the plaintiff in error.

It is claimed that the plaintiff's counsel was guilty of misconduct both in the examination of witnesses and in his argument to the jury.

As to the examination of witnesses, the claim agent of the company was not submitted to any more embarrassing examination than is usually and lawfully indulged in, when such agents are introduced as witnesses. The same is true of other employees of the company, who were witnesses. Said counsel's claims as to what the evidence showed were always corrected by him or the court, when he was mistaken.

The trial judge certifies that some unfortunate wrangling between counsel during the argument was provoked by counsel for plaintiff in error.

It may be assumed that this was true, but, while showing some unnecessary heat and irrelevant allusions, we are unable to conclude that the verdict was influenced thereby.

We have examined all the rulings on evidence called to our attention on the argument, and in the brief of counsel and find no error.

Judgment affirmed.

RECOVERY FOR UNNECESSARY DAMAGES IN REMOVING FIXTURES.

Circuit Court of Cuyahoga County.

LOUIS M. GREIF V. JOSEPH KIEWELL.

Decided, March 20, 1911.

Damages to Real Property—Exemplary Damages—Measure of Damages—Charge Misleading.

1. In an action for removing fixtures from a house, whereby the house itself was damaged, the evidence showing malice, lawlessness and unnecessary damage and a malevolent spirit, exemplary or punitive damages may be awarded.
2. Where damage has been done to real property, the measure of damages is the difference in the value of the property before and immediately after the injury occurred.
3. The consent of the parties in one instance to an erroneous statement of the law, by the court, to the jury, does not bar one of them from complaining of other parts of the charge where the same incorrect statement was made, if the context shows that the charge as a whole was misleading.

H. W. Ewing and W. H. Boyd, for plaintiff in error.

Alexander & Dawley and William Howell, contra.

WINCH, J.; HENRY, J., and MARVIN, J., concur.

Greif was the owner of certain premises on Carroll avenue in the city of Cleveland which he sold, through an agent, to Kiewell.

On the premises was a twelve room residence, fitted up with electric lights, hot water furnace, hot water boiler, wine room,

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cupboards, bath tubs, marble slab, book case, cabinets, a side-board, and other ornamental and useful fixtures, attached to the building. When Greif delivered possession of the premises and moved out, he tore out and carried away with him many of the fixtures, claiming the right to do so, partly on the ground that some of them were not permanently affixed to the building, and partly on the ground that he had expressly reserved the right to do so in the contract of sale.

Thereupon Kiewell brought suit, alleging that Greif out of malice and ill-will and for the purpose of harassing him and injuring the premises had wrongfully, wilfully and maliciously torn out and removed said fixtures, and that in tearing out and removing them he had broken and injured the walls, decorations, finish, stairs, cement floor in basement and other parts of the house and had purposely and maliciously driven nails into the wood work and finish of the house and nailed rough boards over the places from which said shelves, cabinets, etc., had been torn and removed, for all of which he asks damages.

The issues were made up and tried to a jury which brought in a verdict in the sum of \$1,300 for the plaintiff, upon which judgment was entered.

Greif now complains of said judgment in this court, alleging that it is excessive, unwarranted by the evidence and that the trial judge erred in his charge to the jury.

An examination of the record shows that the jury might well have found as it did, if the charge was correct; but two complaints are made with respect to the charge; first, that the jury was instructed that it might assess exemplary damages, and second, the rule as to measure of damages was incorrectly stated.

There was evidence in this case tending to show that Greif acted in a malicious and lawless manner in removing fixtures from the premises; he did unnecessary damage, one instance of which shows clearly his malevolent spirit. Not only did he remove all the push buttons and switches on the electric wiring in the house, but he pulled out some of the wires and shoved others back between the partitions, so that they could not be used again.

It was said in the case of *Railroad Co. v. Hutchins*, 37 Ohio St., 282, 294:

“For every wrong done, if it can be redressed in damages the rule is that the injured party shall have compensatory damages, and if the wrongful act was willful, wanton or malicious, punitive damages may also be awarded.”

This was an action for cutting down and removing timber from a freehold. The timber had passed into the hands of an innocent holder and the court held that punitive damages could not be assessed against such holder. To the same effect is the case of *Iron Co. v. Harper*, 41 Ohio St., 100, where an agent, by a false and fraudulent representation to his principal, obtained possession of his principal's goods and converted them to his own use.

On the measure of damages the trial judge charged as follows:

“If you find that the plaintiff owned these fixtures and that the defendant took them away from there, you should give him a verdict for the fair and reasonable cost of restoring them in as good a condition as they were.”

Again:

“The rule of damage in such cases is that the plaintiff would be entitled to recover any damage done by the removal of property, and the cost of restoring the property to as good a condition as it was before.”

Opposite this phrase on the margin of the bill of exceptions is a statement signed by the trial judge that:

“The language used by the court as follows, ‘and the cost of restoring the property to as good a condition as it was before,’ was used by the court by consent of the parties.”

This annotation by the trial judge shows that he was doubtful of the rule he enunciated. Of course it was wrong. It permitted the plaintiff to obtain new fixtures for old and second-hand ones. The rule laid down repeatedly in this state is that where damage has been done to real property, the measure of damages is the difference in the value of the property before and immediately after the injury occurred. 12 C. C., 426; 12 C. C., 520; 12 C. C., 650.

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The consent of the parties in the one instance to an erroneous statement of the law, should not now bar the plaintiff in error from complaining of other parts of the charge where the same incorrect statement was made, if the context shows that the charge as a whole was misleading. Such we find to be the case for several times the court speaks of the cost of restoring the property to as good a condition as it was before, as referring to a repair of the damage done to what was left, by the tearing out of fixtures and several times as including not only that, but also the cost of purchasing new fixtures, and installing them.

On the whole, it seems that justice will be done by granting a new trial, in order that a jury may be properly directed to a correct conclusion by a correct statement of the measure of damages to be applied in a case like this.

Judgment reversed for error in the charge.

INJURY FROM PARTICLES THROWN OFF BY MACHINERY.

Circuit Court of Cuyahoga County.

JOHN KUMP V. THE KILBY MANUFACTURING CO.

Decided, March 24, 1911.

Negligence—Construction of Statute for Protection of Workingmen.

While Section 4364-89c, Revised Statutes, requires owners and operators of factories and workshops to make suitable provisions for guarding all saws and wood-cutting and wood-shaping machinery so as to prevent injury to persons who may come in contact with them, it does not require that such machinery be so guarded as to prevent material or particles being thrown off from such machinery, to the injury of workmen using it.

H. C. Boyd and C. W. Dille, for plaintiff in error.

Hoyt, Dustin, Kelley, McKeehan & Andrews, contra.

WINCH, J.; HENRY, J., and MARVIN, J., concur.

This was an action for damages for personal injuries sustained by the plaintiff December 15, 1909, by reason of the alleged

negligence of the defendant company in failing to properly guard a circular power saw, as required by the statutes.

Plaintiff alleges in his amended petition that he was a pattern maker and while cutting some prints for patterns "and attempting to push a sawed-off piece of wood away from said unguarded saw, suddenly, by reason of the defendant's negligence in not guarding said saw, said wood was caught in the teeth of said saw and was hurled violently against said plaintiff's right eye, rupturing the eye-ball and permanently destroying the sight of the same."

A verdict was directed for the defendant at the close of the plaintiff's evidence, the trial judge holding that the plaintiff had shown no violation of the statute relied upon, which is Section 4364-89c, Revised Statutes, the cause of the action having arisen before the adoption of the General Code.

The sole question here is whether the court below properly interpreted and applied said statute.

The original act was passed March 20, 1900, and is found in Volume 94 of Ohio Laws, at page 42, and is entitled: "An act to provide for the guarding of machinery."

The first section of the act provides:

"That owners and operators of factories and workshops, which terms shall mean all manufacturing, mechanical, electrical and mercantile establishments, and all places where machinery of any kind is used or operated, shall take ordinary care, and make such suitable provisions as to prevent injury to persons who may come in contact with such machinery, or any part thereof; and such ordinary care and such suitable provisions shall include casing or boxing of all shafting when operating horizontally near floors, or when in perpendicular or other position operating between, from, or through floors, or traversing near floors, or when operating near passageway, or directly over the heads of employees; the enclosure of all exposed cog-wheels, fly-wheels, band-wheels, all main belts transmitting power from engine to dynamo, or other kind of machinery, and all openings through floors, through, or in which such wheels or belts may operate, with substantial railing; the covering, cutting off, or counter-sinking of kegs, bolts, set-screws and all parts of wheels, shafting, or other revolving machinery, projecting unevenly from and beyond the surface of such revolving parts of such machinery; the railing in all of unused elevator openings, the placing of auto-

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matic gates or floor doors, and the keeping of same in good condition, on each floor from which and whereon each side or sides, of elevator openings entrance to the elevator carriage is obtained, the frequent examination and keeping in sound condition of ropes, gearing, and other parts of elevators, the closing of stair openings on all floors, except where access to stairs is obtained, and the railing of stairs between floors, the lighting of hallways, rooms, approaches to rooms, basements and other places wherein sufficient daylight is not obtainable; the guarding of all saws and other wood cutting and wood shaping machinery, providing shifters for shifting belts, and poles or other appliances for removing and replacing belts on single pulleys, and adjusting runways, and staging used for oiling and other purposes, more than five feet from floors with hand railing, and providing counter shafting with tight and loose pulleys or such other suitable appliances, in each room, separate from the engine room, for disconnecting machinery from other machinery when in operation."

The second section provides that any owner or operator of a factory or workshop who violates any provision of the first section shall be fined.

The third and fourth sections provide for inspection of shops and factories, to the end that the act may be enforced.

Section 4238c-1, Revised Statutes, abolishes the defense of assumed risk, where an employee has been injured by the negligent omission of his employer to guard or protect his machinery in the manner required by any penal statute of the state or United States, but limits the recovery to \$3,000 where injury does not result in death.

The operative words of 4364-89c applicable to this case, which require construction, are as follows:

"The owners and operators of factories and workshops, which terms shall mean all places where machinery of any kind is used or operated, shall take ordinary care, and make suitable provisions so as to prevent injury to a person who may come in contact with any such machinery, or any part thereof, and such ordinary care and such suitable provisions shall include the guarding of all saws and wood cutting and wood shaping machinery."

The trial judge held that the plaintiff could not recover in this case, because, in his judgment, the statute provided only for the

guarding of saws in such manner as to prevent any person being injured by coming in contact with the saw and did not require a guard which would prevent an injury by pieces of material thrown off by the saw and striking some person not in contact with the machinery.

The whole of this statute has been quoted so as to show how carelessly it was drawn. Other parts of the statute, not applicable to this case, have been before the courts. The Circuit Court of Lucas County, speaking by Kinkade, J., in the case of *Marine Boiler Works v. Shuck*, 13 C.C.(N.S.), 118, calls attention to the defect in the statute as to the protection of cog-wheels. On page 121 he says:

“It will be observed, as I have said, on a careful reading of this statute, that there is nothing in the section which provides that exposed cog-wheels shall be boxed or covered. The statute distinctly and plainly states that exposed cog-wheels shall be enclosed with a substantial railing. It is perfectly apparent to anybody that a railing in front of cog-wheels, if a man is obliged to have his hand near the cog-wheels, might be sufficient to protect his body from getting into contact with the cog-wheels, and at the same time have no effect in preventing his hand from coming in contact with the cog-wheels and being ground off. Of course it is not the business of the court to legislate; it is our business to find out what the statute says and declare it, and after the fullest consideration we have unanimously arrived at the conclusion that this statute, insufficient though it may appear in that form, provides only for a substantial railing to protect the one operating near exposed cog-wheels.”

While this legislation has penal features, yet, on the other hand, it is humanitarian in its purposes, so that a middle course should be taken in its construction. A reasonable meaning should be given to the words used; not too narrow, because of its penal features, nor too liberal, on account of its remedial nature.

The attention of the court has been called to the wording of this statute, as now found in the General Code, Section 1027.

There it is made the duty of manufacturers to prevent injury to persons who use or come in contact with machinery. The question would be more difficult if the accident had happened since the adoption of the General Code; but, if the Legislature

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intended to extend the scope of the statute by inserting the word "use," we are not helped by it. If, on the other hand, as claimed by counsel, the word "use" was inserted only as showing the interpretation put by the Legislature upon the meaning of the words "come in contact with," we can only say that this Legislature conceived the words to have a different meaning from that understood by the Legislature which adopted the act, and so we are left to pass our own judgment upon it, guided by the rules of construction referred to.

Without referring to the lexicographers' definitions, the ordinary persons would understand that the law here involved plainly means that employers of labor are required to guard saws so that employees may not be injured by coming in contact with them.

Had the Legislature intended that they should guard saws so that material or particles should not be thrown off from them to the injury of workmen requiring other and different devices from those which prevent contact with the saws, such intention might have been clearly expressed in simple language, leaving no doubt as to the intention of the Legislature.

Two years before the act in question was adopted, the Legislature had before it the prevention of accidents from just such causes, where dust creating machinery is used, and we find that it required that blowers or similar apparatus be placed over, beside or under emery wheels, etc., in such manner as "to protect persons using the same from the particles of dust produced and caused thereby and to carry away the dust arising from or thrown off by such wheels or belts while in operation." R. S. 4364-86; 93 O. L., 155.

The danger in such cases apprehended is from objects thrown off from the machine; in the case of a saw the danger apprehended is from coming in contact with the saw. In other words, the Legislature had in mind the well known danger one runs of having his fingers cut off by coming in contact with a circular saw, if he uses it without a proper guard.

The record shows that a guard to prevent the cutting off of fingers does not prevent accidents such as befell the plaintiff.

The question here involved is not free from difficulty and doubt, and we are therefore unable to say that the trial judge was clearly wrong in directing a verdict for the defendant.

Judgment affirmed.

JURISDICTION OF THE COMMON PLEAS COURT ON A CLAIM FOR LESS THAN \$100.

Circuit Court of Cuyahoga County.

SAMUEL CLARKE ET AL V. THEODORE CANNON.

Decided, March 24, 1911.

Mechanic's Lien—Amount Less than \$100—Jurisdiction of Common Pleas Court—Husband and Wife Jointly Indebted, When.

1. Where an action is brought in the common pleas court to foreclose a mechanic's lien for less than \$100, said court may retain the case and enter judgment for the amount claimed, although it adjudicates that the lien is invalid.
2. One who upon the order of a husband furnishes material for the construction of a house upon land the title to which stands in the wife, may have judgment therefor against both, if it appears that the whole project was a joint and family undertaking, to which both contributed of their means as far as they could, and in the benefits of which both parties were to share.

W. T. Black and O. J. Campbell, for plaintiffs in error.
Seidman & Seidman, contra.

WINCH, J.; HENRY, J., and MARVIN, J., concur.

Defendant in error was plaintiff below, where he filed a petition containing two causes of action, one setting up a mechanic's lien and the other asking for judgment on the account claimed to be secured by said mechanic's lien; this account was for less than \$100.

He failed as to his mechanic's lien, because notice to the owner was not given as provided in the amendment to Section 3185, Revised Statutes, found in 97 Ohio Laws, 499, which provides:

“Such persons so filing the affidavit herein provided, shall within thirty days thereafter notify the owner of the property,

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his agent or attorney, that he claims such lien, and if he fail to do so, the lien so secured shall be null and void.”

This clause appears as Section 8315, in the General Code. On his other cause of action, on the account, he recovered judgment against both plaintiffs in error, who are husband and wife, the wife owning the property and claiming that her husband was not her agent in ordering the work done for which the plaintiff sued, but that she had made a written contract with her husband for the erection of a house on her own lot, and that he had made a personal contract with the plaintiff as a sub-contractor, upon which the husband alone, as principal contractor, was liable.

The case here requires an answer to two questions:

First, had the common pleas jurisdiction to render any judgment on the account, the amount thereof being less than \$100, the limit of said court's original jurisdiction?

The action involving a lien upon real estate, it was properly brought in the common pleas court, although the amount claimed was less than \$100; the proof showed that the plaintiff had complied with the law and secured a lien, but that it afterwards became null and void by the plaintiff's failure to notify the owner of his claim within thirty days after filing his affidavit.

The analogy between the situation here and in a case where the plaintiff sues for more than \$100 but recovers less, is apparent. It is said in the case of *Draper v. Clark*, 59 Ohio St., 336, at page 340:

“It has been uniformly held that the amount claimed and not the amount recovered, determines the jurisdiction of the common pleas. If it were otherwise, the absurd result would follow that the court would be compelled to hear and determine a case on its merits in order to determine its jurisdiction.”

See also *Jenney v. Gray*, 5 Ohio St., 46; *Brunaugh v. Worley*, 6 Ohio St., 597, and *Linduff v. Plank Road Co.*, 14 Ohio St., 336.

It would seem that the reasoning of these cases requires us to hold that where an action is brought in the common pleas court to foreclose a mechanic's lien for less than \$100 said court may

retain the case and enter judgment for the amount claimed, although it adjudicates that the lien is invalid.

Second, was the wife liable on this debt?

An answer to this question requires an examination of the weight of the evidence. We have read the record and think that it shows clearly that although the wife held title to the lot on which the house was built, and although she pretended to make a written contract with her husband for the erection of a house thereon, still the whole project was a joint and family undertaking, to which both parties contributed of their means so far as they could, and in the benefits of which both parties were to share.

The pretended contract was in the sum of \$2,400; by a mortgage on the property \$1,800 was raised; both parties signed the note secured by this mortgage. The wife wholly fails to explain where the other \$600 was to come from. She says she left that to her husband.

The judgment being against both husband and wife, we are unable to say that it was not supported by the evidence.

Judgment affirmed.

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Hamilton County.

AS TO PREPARATION OF BILLS OF EXCEPTIONS.

Court of Appeals for Hamilton County.

STATE OF OHIO, EX REL WILLIAM C. DORY, v. WILLIAM L.
DICKSON.*

Decided, December 20, 1913.

Transcript of Evidence in Narrative Form—Duty of Trial Judge in Connection with Preparation of a Bill of Exceptions—Construction of the Rule of the Court of Appeals.

1. That part of Rule I of the Courts of Appeals of Ohio, providing for a reproduction of a verbatim transcript of the evidence, when desired by either party or directed by the court, is not intended to furnish opportunity to a party to harass his opponent by putting him to the trouble and expense of reproducing it. Where a party desires a complete transcript, it is his duty to furnish it.
2. When a proper bill of exceptions has been prepared in narrative form under the rule, the trial judge should not as a matter of convenience order a verbatim copy of the evidence, but if he can not sign it as presented it is his duty to suggest to counsel what corrections should be made and to render him reasonable assistance and give necessary time for the making of such corrections, not however to the extent of placing the burden of the preparation of such bill of exceptions upon the judge.

Marston Allen, for plaintiff in error.*Geoffrey Goldsmith*, contra.

JONES, O. B., J.; SWING, J., and JONES, E. H., J., concur.

The purpose of Rule I of the court of appeals in providing for what has been called a short form of a bill of exceptions, is to furnish a method of bringing into the record only so much of the evidence as may be necessary to present clearly the questions of law and fact to be considered by a court of error in determining the correctness of the ruling of the trial court, without at the same time encumbering the record with the needless, immaterial and obscuring matter that will always be found in a record made up of a complete transcript of the modern stenographic report of all the evidence and proceedings at the trial.

*For opinion below, see 15 N. P. (N.S.), 302.

The rule is in the following words:

“Only so much of the evidence shall be embraced in a bill of exceptions as may be necessary to present clearly the questions of law and fact involved in the rulings to which exceptions are reserved, and such evidence as is embraced therein shall be set forth in condensed and narrative form, save that if either party desires it or the court or judge so directs, any part or all of the evidence shall be reproduced verbatim.”

It is authorized by and is in accord with the General Code, Section 11562:

“No particular form of exception is required. The exception must be stated with the facts, or so much of the evidence as is necessary to explain it, and no more, and the whole as briefly as possible.”

That part of the rule providing for the reproduction of a verbatim transcript of the evidence, when desired by either party or directed by the court, is not intended to furnish opportunity to a party to harass his opponent by putting him to the trouble and expense of producing it. Where a party desires such complete transcript it would seem to be his duty to furnish it. Nor should the judge impose a hardship upon the party by requiring such transcript without necessary and sufficient cause.

It is the duty of the litigant, or his counsel, and not that of the trial judge to prepare the bill of exceptions, but if the judge can not allow and sign it as filed it becomes his duty to suggest to counsel what corrections should be made and to render him reasonable assistance and necessary time for such corrections.

When a proper bill of exceptions in narrative form under the rule has been prepared and filed, it is not proper for a trial judge, as a matter of convenience to himself and to avoid the labor of correcting it, to order a verbatim copy of all the evidence and proceedings to be supplied and substituted for the narrative form of evidence. Nor would it be proper for the judge to order a full stenographic copy of the evidence merely for the purpose of examination, comparison and preparation of the narrative form to be used in the bill of exceptions.

It is the right of a litigant, if he so desires, to have his case reviewed by an upper court, and it is the duty of the trial judge

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to assist the litigant in the enjoyment of that right as much as it is his duty to protect him in any other right than he might be properly asserting in such court.

Either party in a case is entitled to have any exceptions that he may take to the rulings of a judge preserved for trial in a higher court. This he can do by taking a single bill of exceptions embodying only so much of the record as may be necessary to have that ruling reviewed, and he may if he sees fit take separate bills of exceptions to separate rulings, or he may embody all of his exceptions together with all of the evidence in one bill of exceptions. To choose between these methods is the prerogative of the litigant.

The court's duty, however, is to determine as to the correctness of the bill or bills of exceptions, and his determination of what is a true bill is final. A party can not by submitting a mere skeleton of a bill of exceptions demand that a trial judge should practically prepare it by furnishing all omitted parts or necessary matters that should have been embodied in it. The heavy labors of the judge should not be increased by requiring from him any considerable part of the labor of its preparation, but he should be ready and willing to render reasonable assistance to counsel in pointing out and advising him as to what should be included, not however to the extent of controlling his determination as to how much or how little he sees fit to place into the record for the purpose of seeking review. If the bill of exceptions prove not sufficient to properly present the question desired in the court above, that will be the misfortune of the party, or his counsel, who prepares it.

The bill of exceptions as filed with this petition in mandamus seems to show that as originally filed in the common pleas court, it consisted of pages 1, 2, 3, 4, 5, 6 and 7, and subsequently it was sought by plaintiff's counsel to correct the same by offering pages x, y and z in place of pages 1 and 2, except the last two paragraphs on page 2 which were to be retained and follow page z, and z is followed in turn by page 3 and the remaining pages of the bill of exceptions.

With either form taken as the bill of exceptions, had the certificate been signed without modification as originally presented,

it would hardly be claimed that it showed that it included all of the evidence. The words found in the last paragraph on page 2 "With this as a brief statement of all the evidence, the court charged the jury as follows:" might be claimed to effect the purpose of such a certificate, but in either form as prepared, of what would precede them, it would hardly authorize a court of error to review the judgment as to the weight of the evidence.

If the trial court feared that the language above quoted might be misconstrued into a certificate that the bill of exceptions contained all of the evidence, they might have been stricken out or modified by the judge in correcting the bill.

We take it, however that the purpose of counsel for plaintiff below was only to prepare a record that would afford an opportunity to review the ruling of the court in refusing to admit testimony offered by him in rebuttal, as shown on page 2, and to review the general charge as given by the court. This bill of exceptions is signed by the trial judge at the bottom of page 7, after all of the formal language of the certificate of allowance though not in the blank space originally left for that signature, adding certain language to the effect that the court does not know whether the above pages of the evidence embrace all of the evidence or not, and that the charge of the court is correct.

For the purpose of reviewing the correctness of the charge and the ruling above referred to as to the admission of evidence this court is of the opinion that the bill of exceptions as signed by the trial judge becomes a bill of exceptions which may be considered by the court of error, and for that reason the writ prayed for will be refused.

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**PROCEDURE WHERE SUBORDINATE IS SUSPENDED BY CHIEF
OF POLICE.**

Circuit Court of Cuyahoga County.

STATE OF OHIO, EX REL JOSEPH FINDING, V. FRED KOHLER, HY. D.
WRIGHT, H. L. DAVIS AND JOHN VANEK.

Decided, March 20, 1911.

*Municipal Corporations—Chief of Police—Suspension of Subordinate—
Trial by Director of Public Safety.*

When suspension is any part of the punishment inflicted upon one of his subordinates by the chief of police, he must forthwith certify that fact in writing to the director of public safety, for trial and judgment.

F. F. Gentsch, for plaintiff.

Newton D. Baker, contra.

WINCH, J.; HENRY, J., and MARVIN, J., concur.

While the chief of police of the city of Cleveland is invested by the statutes and police regulations with ample discretionary powers for disciplining his subordinates, the plain provisions of Section 4380, General Code, require that when suspension is any part of the punishment denounced by him, he shall forthwith in writing certify such fact together with the cause therefor to the director of public safety, who, within five days from the receipt thereof, shall proceed to inquire into the cause of such suspension and render judgment thereon. A peremptory writ to that end will issue in this case. The injunction prayed for is denied.

LIABILITY FOR BITE BY DOG ON OWNER'S PREMISES.

Circuit Court of Cuyahoga County.

RAYMOND FRERICH, AN INFANT UNDER FOURTEEN YEARS OF AGE,
v. MATHEW C. BLAKE.

Decided, March 24, 1911.

Vicious Dog on Owner's Premises—Pleading—Sufficient Averments.

A petition which states that the plaintiff was lawfully on the defendant's premises and while there was bitten, without his fault, by defendant's dog while it was running at large thereon in the day time, unmuzzled, shows a cause of action.

Webber & Metcalfe, for plaintiff in error.

P. H. Kaiser, contra.

WINCH, J.; HENRY, J., and MARVIN, J., concur.

A demurrer to the petition was sustained in this case.

It avers that the plaintiff, an infant nine years old, was lawfully on the defendant's premises and while there was bitten without his fault by defendant's dog while it was running at large thereon, in the daytime, unmuzzled.

It will be noticed that the dog was upon its owner's premises and there is no allegation that he had knowledge of its vicious propensities.

Under the Hayes case, 62 Ohio St., 161, such knowledge and negligent keeping of the dog thereafter, is the gist of the action.

About a month after that case was decided, the Legislature passed an act, now known as Section 5838, General Code, which reads as follows:

“A dog that chases, worries, injures or kills, a sheep, lamb, goat, kid, domestic fowl, domestic animal or person, can be killed at any time or place; and, if in attempting to kill such dog running at large, a person wounds it, he shall not be liable to prosecution under the penal laws which punish cruelty to animals. The owner or harbinger of such dog shall be liable to a person damaged for the injury done.”

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It is conceded that this statute does away with the necessity of alleging that the owner knew the dog to be vicious. *Guis v. Zech*, 24 Ohio St., 329.

But it is said that the statute gives a right of action to a person bitten by a dog running at large and not by a dog upon its owner's premises.

This is said to follow from the provision that only when you wound such dog running at large, are you not liable to prosecution for cruelty to animals.

We do not so read the statutes, "such dog" in the last sentence, the same as "such dog" as previously used, refers to "a dog that chases, worries, injures or kills a sheep, lamb, kid, goat or domestic fowl or domestic animal or person."

The policy of the statute seems to be to permit a man to keep a dog at his peril and to make him responsible for any damage or injury the dog may do, whether the owner has a reason to apprehend it or not. Those who do not like dogs will approve of this law, and the people are about equally divided between those who like dogs and those who do not.

There seems to be no good reason for exempting a dog owner from liability to one bitten while lawfully upon the owner's premises. That is where dogs get bold and do the most damage to innocent visitors. The wording of the statute requires no such restrictive interpretation as plaintiff in error urges, and the petition is held to make a case under the statute.

Judgment reversed.

**SUFFICIENT REASON FOR TERMINATING CONTRACT FOR
SALE OF GOODS.**

Circuit Court of Cuyahoga County.

THE BELL GARMENT COMPANY v. THE UNITY SILK COMPANY.

Decided, March 24, 1911.

Contract—Breach by Purchaser Relieves Seller from Contract.

A garment company being indebted to a silk company for silk furnished it, agreed to pay its bills when due, if the silk company would furnish it further silk, "up to twenty-five pieces, as many as you can at once." Accordingly the silk company shipped two more pieces of silk but the garment company, instead of paying its bills then due, sent on a check for only part of the amount keeping out a certain sum, as it claimed, "for the purpose of protecting it and guaranteeing that the silk company would perform its contract in the future." *Held:* By so doing the garment company gave good excuse to the silk company to terminate the contract.

Fred Desberg, for plaintiff in error.

Weed, Miller & Rothenberg, contra.

WINCH, J.; HENRY, J., and MARVIN, J., concur.

The silk company sued the garment company on an account for goods sold and delivered. The garment company counter-claimed for damages arising out of the silk company's failure to deliver all the goods ordered. Judgment was for the silk company.

It appears that in November, 1906, by correspondence, an agreement was entered into between the parties for the sale of sixty-six pieces of black taffeta silk to be according to sample. Certain pieces were shipped in November and December, which were not according to sample, but the garment company kept them and an allowance in price was made. Terms of payment were seventy days, and the bills for these shipments came due in February, 1907. Meanwhile, the silk company appears to have tried to get out of delivering the balance of the order, the price of such silk having gone up. However, in February, the

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garment company wrote the silk company that if the latter would ship it "up to twenty-five pieces, as many as you can, at once," it would pay its bills when due. And a few days later, after another bill had come due, it wrote: "We would ask you to hurry some of this forward as we are only wanting to see how this comes up as compared to the material originally purchased of you, before remitting on account."

Accordingly, the silk company on March 7 shipped two more pieces of silk of the required quality to the garment company, but the latter, instead of paying its bills then due, as it had agreed to, sent on a check for only part of the amount, keeping out a certain sum, as it claimed, for the purpose of protecting it and guaranteeing that the silk company would perform its contract in the future.

We think that by so doing the garment company gave good excuse to the silk company for terminating the contract.

No matter what the conduct of the silk company had been before that time, the garment company had waived all breaches of the contract by urging that twenty-five more pieces be sent on, and agreeing to pay its pending bills upon receipt of part of said order. The earnest of the silk company that it would continue to ship, was very small, only two pieces, but it complied with the agreement and the garment company was obliged to pay its bills. This it refused to do and thereby authorized the silk company to terminate the contract. The judgment was properly for the silk company.

We find no error in the ruling on evidence complained of, and the judgment is affirmed.

LIABILITY OF DIFFERENT SETS OF SURETIES.

Court of Appeals for Wood County.

A. J. STEELE v. D. J. GONYER ET AL.

Decided, May 8, 1913.

Sureties—Guaranties to Bank for Payment of Loans—Action to Enforce Contribution from Sureties.

1. An action against co-sureties for contribution is not one in which there is a right to trial by jury and is therefore appealable.
2. Where a guaranty is executed in favor of a bank to protect it in the making of certain loans, and subsequently a second guaranty is executed, and thereafter one who had signed both guaranties is compelled to make the loans good, and brings an action to enforce contribution from his co-sureties, the second guaranty will not be regarded as a novation, but recovery may be had from the signers of the first guaranty on the basis of the amount due to the bank at the time of its acceptance of the second, and from the signers of the second guaranty for indebtedness contracted after its execution and acceptance by the bank.

Geo. H. Phelps, for plaintiff.

B. F. James and McClelland & Bowman, contra.

RICHARDS, J.; KINKADE, J., and CHITTENDEN, J., concur.

Appeal from Court of Common Pleas of Wood County, Ohio.

This action is being prosecuted for the purpose of enforcing contribution from co-sureties upon a certain bond executed by plaintiff and defendants to the First National Bank of Bowling Green.

A motion was made and submitted to dismiss the appeal, but we are of the opinion that under the authority of *McCrary v. Park*, 18 O. S., 1, the case is appealable.

It appears from the evidence in the case that the plaintiff and the defendants were stockholders in a certain corporation, known as the Oil Well Salvage Company, with its principal place of business in the city of Bowling Green, and that said company desiring to obtain a line of credit at the First National Bank,

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it was agreed by the parties to this action that they would execute to the bank a written guaranty to protect the bank upon loans which should be made by it to the salvage company, and that thereupon it executed on July 3d, 1905, a bond to said bank to secure such loans, not exceeding the sum of ten thousand dollars at any one time. This bond was signed by all of the parties to this action, and under and pursuant to its terms sundry sums of money were advanced at various times by the bank to the salvage company. During the existence of this bond a new cashier was chosen for the bank, and shortly after his induction into office he deemed it advisable to obtain a new bond of indemnity for loans made to the salvage company, and accordingly he requested the attorney for that company, who was also one of the signers of the bond of indemnity, to have a new indemnity bond executed to the bank. The matter was taken up with the salvage company and at a meeting of its directors held on September 5th, 1906, it was determined that they should execute a new bond as requested by the cashier of the bank, which was accordingly done. A new bond in form precisely the same as the first bond was signed by the same persons, with the exception of the defendant, E. P. Bourquin, whose name was not attached thereto.

At the time this bond was executed the bank held the obligations of the salvage company in the amount of about six thousand five hundred dollars, and after the new bond was executed it advanced an additional amount in the sum of about twenty-five hundred dollars. On April 16th, 1908, the total indebtedness due from the salvage company to the First National Bank then remaining unpaid was the sum of \$7,891.18, and on that date the plaintiff paid to the bank of his own funds the sum of \$5,000 and the defendant H. J. Rudolph paid the sum of \$2,891.18. Subsequently to this date the bank delivered to the plaintiff both guaranties and the obligations representing the indebtedness from the salvage company to it, and it is now sought by the plaintiff to enforce contribution among the several signers of the guaranties.

It is contended by counsel for Bourquin, that the new guaranty amounted to a novation or a substitution, and that it is the

only guaranty in force and that therefore Bourquin is not liable to contribute in any amount.

On the other hand it is contended by plaintiff that the liability arises and exists entirely under the first guaranty, and that Bourquin is consequently bound to contribute his *pro rata* share of the entire indebtedness.

The record does not disclose why Bourquin failed to sign the new guaranty, but it does appear that the remaining signers were willing to execute the new guaranty without his signature, and that the bank through its cashier was willing to and did accept of this guaranty.

Under these circumstances as disclosed by the evidence we think that the plaintiff has the right to enforce contribution, and that the signers of the first guaranty are liable for the indebtedness existing at the date of the second guaranty, and the signers of the second guaranty are liable for the indebtedness contracted after its execution and acceptance by the bank. This holds Bourquin for contribution as to all indebtedness unpaid at the time of the execution of the second guaranty, but for no indebtedness thereafter contracted.

The principal seems to be in accordance with the rule announced in *Corrigan v. Foster, Admr.*, 51 O. S., 225, and *Buffington v. Bronson*, 61 O. S., 231.

A decree may be drawn enforcing contribution in accordance with the views expressed in this opinion, excluding however from consideration D. J. Gonyer, who has at all times been beyond the jurisdiction of the court since the commencement of this action, and excluding also Edward Beverstock, who is insolvent; and it appearing to the court that uncertainty exists as to the financial responsibility of one or more of the other defendants, it is ordered that this cause be remanded to the court of common pleas to carry the decree into effect, and that jurisdiction be retained by said court for the purpose of making any further order that may be necessary.

It appears that no notice or demand was made on the defendant Bourquin, and he is not therefore liable for costs in the action. See *Nelson & Churchill v. Fry*, 16 O. S., 552.

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GUARANTY DISTINGUISHED FROM PUFFING OF WARES.

Circuit Court of Mahoning County.

SLOCUM-BERGREN & COMPANY V. THE LIMOGES CHINA COMPANY.

Decided, March 31, 1911.

Guaranty—Puffing of Wares.

A clause in a contract for the sale of two hundred packages of china whereby "the defendant agreed with and guaranteed to plaintiff that said two hundred packages of china should and would be sold to customers of the plaintiff within ninety days from the date of said contract" is not a contract of guaranty, is a mere puffing of wares, and furnishes no basis for a law suit, if plaintiff fails to sell the china within the ninety days.

WINCH, J.; MARVIN, J., and NORRIS, J., concur.

This was an action for breach of contract of guaranty. The petition alleges that the plaintiff agreed to purchase from the defendant, and defendant agreed to sell to plaintiff, two hundred packages of coffee assortment china at the agreed price of \$6 per package, and as part of said contract, on condition that the plaintiff would pay the purchase price, the defendant agreed with and guaranteed to plaintiff that said two hundred packages of china should and would be sold to customers of the plaintiff within ninety days from the date of said contract.

The petition further alleges the delivery of the china, payment therefor, and due diligence and effort of the plaintiff to sell the same to its customers, without avail; none of the china being sold within ninety days, it offered to return it and demanded its money back, which being refused, it brought suit.

A demurrer to this petition was sustained and we think very properly.

We find in this so-called guaranty no warranty of the quality or value of the china, or its adaptability to any particular purpose; we find no guaranty of anything to be done about it by the vendor; it is said that plaintiff should and would sell two hundred packages to its customers but it does not appear that the plaintiff had that many customers, or any.

It is alleged that the plaintiff used all due diligence and effort to sell the same to its customers, but at what price does not appear, nor was there any agreement that it should be sold at any particular price.

This was more like a gambling contract or a bet than a guaranty, and at that left the performance of the feat wholly within the power of the person guaranteed, as if I should say "I guarantee you can run a mile, if you try." Does this guarantee you against falling down, so that you can recover of me if you do?

A guaranty has been defined to be the contract by which one person is bound to another for the fulfillment of a promise or engagement of a third party. There was no third party in this case. The so-called guaranty was a mere puffing of wares and should have been so understood by plaintiff; had it desired more, it should have so contracted that the defendant would take off its hands all packages not sold at the end of ninety days. A suggestion of this kind would have saved this lawsuit.

Judgment affirmed.

EMPLOYEE HURT BY FALLING OF WINDOW SASH.

Circuit Court of Mahoning County.

ANDREW SERAFINO ET AL V. RALPH ANTINELLO.

Decided, March 31, 1911.

Master and Servant—Negligence—Simple Device—Situation Known to Servant—Assumed Risk.

A stick, with which a window is held open, is a simple device, and a laborer who crawls through a window so held open, forty or fifty times, with the stick in plain view, and finally knocks it out with his hand or foot and is injured by the falling sash, will be held to know the dangers attendant upon the situation and can not recover in an action against his employer for the latter's alleged negligence in using the stick to keep the window open.

WINCH, J.; HENRY, J., and MARVIN, J., concur.

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In this case Antinello, who was a laborer, carrying mortar for bricklayers, recovered a judgment against his employers for damages sustained by reason of a heavy window sash falling upon him and cutting him upon the face, neck and arms.

Antinello mixed the mortar outdoors and carried it to the bricklayers who were working in the basement of a school house. He carried the mortar in a bucket to a large window, about four feet square, and set the bucket on the window sill, climbed through the window, and then carried the bucket and emptied it on the scaffolding near the bricklayers. The window sash was held by a stick at the side in the way cellar windows are frequently held open. Antinello went through this window forty or fifty times in this manner, carrying mortar; the last time he climbed through the window with his arm or his leg he knocked out the stick supporting the sash and it came down and caused the injuries sustained by him.

The evidence shows that some five or six windows in this basement were all open, the sash being sustained by sticks, as in the case of this window, and the room inside was light; the accident happened about half past two o'clock in the afternoon of the seventeenth of July.

Antinello testified that he didn't know how the sash was sustained; everybody else about the place knew that the windows were kept open by the use of sticks.

The jury was properly charged that the plaintiff could not recover if he had equal means with his employer of knowing how the sash was propped up, and yet it brought in a verdict for the plaintiff.

We think this verdict is not sustained by the evidence. A man couldn't crawl through a window forty or fifty times without knowing about a stick at the side supporting the sash; he would have to watch that stick every time he went through the window, to avoid striking it with his feet. If he used his eyesight he would see the stick and know what it was there for; he would also know at a glance what would happen if the stick was carelessly knocked out of place.

In view of the simple and common nature of this device for holding up this window sash and the numerous opportunities

the plaintiff had of observing it, the jury was not warranted in finding that the plaintiff neither knew of the stick nor had means of knowing about it, and the dangers of knocking it out.

Judgment reversed for error in overruling the motion for a new trial on the ground that the verdict was not sustained by the evidence.

VALIDITY OF THE ROAD DISTRICT ACT.

Circuit Court of Mahoning County.

ENSIGN E. HARDING v. FRANK AGNUE ET AL.

Decided, March 31, 1911.

Constitutional Law—Road Districts and Commissioners.

Sections 7095, *et seq.*, General Code, providing for road districts and the appointment of road commissioners and defining their duties, are constitutional.

WINCH, J.; HENRY, J., and MARVIN, J., concur.

This was an action to restrain the commissioners of road district No. 1 of Mahoning county from issuing bonds for the improvement of roads within said district. No fault is found with the regularity of the appointment of said commissioners or of any of their acts, but it is said that the acts under which they were appointed and are assuming to act, are unconstitutional.

These acts are now found in chapter 5, title 4, part 2 of the General Code, beginning at Section 7095.

The following are the various steps in the organization of a road district under the provisions of said chapter. Upon the filing of petitions from not less than two nor more than four townships in any county, signed by at least fifty tax-payers of each of said townships, asking for the improvement of the public roads of such township, the county commissioners pass resolutions and spread them upon their journal, and within ten days thereafter such townships become a road district. After the expiration of ten days the county commissioners notify the

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trustees of the townships composing the alleged road district to place in nomination the names of suitable persons for road commissioners; from these names so placed in nomination, the county commissioners select a board of road commissioners; said board forthwith meets at the county seat and organizes by electing a president and secretary; their term of office is four years; before entering upon their duties they take an oath of office and give bond in the sum of \$1,500; within ten days thereafter said board of road commissioners notify the board of deputy state supervisors of elections of the county of its organization and thereupon the board of elections of the county submit to the electors of the district the question of improving the roads of the district; if a majority of the votes cast at such election is against improvement of roads, the road commissioners can not assess a tax, and their duties cease.

There are these constitutional objections raised:

First. It is said that this act contravenes Section 1, Article II, of the Constitution, in that it confers legislative powers upon the electors of a road district; authorizes them to legislate a duly appointed board of road commissioners out of office. This does not appear upon the face of the act. No duties are imposed upon the commissioners until the people have voted to charge themselves with a general tax for improvement of the roads of that district. Hence, the people can not legislate them out of duties which they can not exercise before a vote.

In this case a favorable vote is shown by the petition and the point does not appear to be well taken.

Second. It is said that this law violates Article II, Section 20 of the Constitution in that it permits the electors of the district to fix the term of office of the commissioners, while said section requires that the Legislature shall fix the term of office of all officers.

We think the law has fixed the term at four years; if it provides for removal within that term, it is no different from many other statutes which provide for removal of officers within their terms for various reasons.

Third. It is claimed that this law does not conform to Section 18 of the Bill of Rights, which provides that "no power of

suspending laws shall ever be exercised except by the General Assembly."

We see no such vice here. It is a general enabling act, like the corporation statutes under which individuals may organize and dissolve corporations, and like the municipal code, under which municipal corporations may be created and dissolved.

Fourth. It is said that road commissioners are either township or county officers, and so must be elected, as provided in the second and fourth sections of Article X of the Constitution.

We hold them to be district officers, and so not under this provision. They are more nearly like the directors of public service, in cities.

Petition dismissed.

PROCEEDINGS IN ATTACHMENT.

Circuit Court of Cuyahoga County.

TILLIE BENOSKI v. THE C. F. ADAMS COMPANY.

Decided, May 8, 1911.

Error from Common Pleas—Attachment—Motion to Dissolve—Service on Garnishee—Attachment Bond Signed by Corporation—Authority of Corporation Officer.

1. Error lies to the circuit court from an order of the common pleas court overruling a motion to discharge an attachment appealed to the latter court from a justice of the peace.
2. An attachment will not be discharged on the ground that there was no service upon the garnishee in the attachment proceedings.
3. A judgment overruling a motion to dissolve an attachment on the ground that the attachment bond was given by a corporation, the name of which was signed by an officer who had no authority to sign its name to such bond, will not be reversed where there is no bill of exceptions showing the evidence acted upon in sustaining the bond and attachment.

Wing, Myler & Turney, for plaintiff in error.

Albert Lawrence, contra.

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WINCH, J.; HENRY, J., and JONES, J. (sitting in place of Marvin, J.), concur.

The Adams Company sued Miss Benoski before a justice of the peace and instituted attachment proceedings for the purpose of garnisheeing her wages.

She filed a motion to discharge the attachment specifying no grounds therefor; this motion being overruled, she appealed to the common pleas court, where it was again heard and determined adversely to her.

Thereupon she filed in this court a petition in error to reverse the judgment of the common pleas court, together with a transcript of the docket and journal entries of said court and the original papers filed with the justice of the peace, but we have no bill of exceptions showing what, if any, evidence was heard on the motion in the common pleas court, and there is no transcript of the docket of the justice of the peace, showing what, if any, orders were made by him in the matter.

In this court motion is made to strike the petition in error from the files, on the ground that error does not lie to the judgment of the common pleas court overruling a motion to dissolve an attachment. This motion is based upon a ruling of the Hamilton County Circuit Court in the case of *Lyon v. Phares*, 9 C.C.(N.S.), 614; but we do not agree with that court upon this point; the practice in this circuit has been otherwise.

Said motion is overruled.

Two reasons are assigned as requiring a reversal of the judgment of the common pleas court:

First. It is said that there was no service upon the garnishee in the attachment proceedings.

Having no record of the proceedings before the justice, we do not know but what the garnishee appeared and answered; indeed, counsel for plaintiff in error suggests that the garnishee was cited for contempt, was brought in, examined and found to have no funds belonging to the judgment debtor.

In any event, the point is not well taken. See *Cleveland Sierra Mining Co. v. Sears Union Water Co.*, 4 O. D. Rep., 208; *Railroad Co. v. Peoples*, 31 O. S., 537.

If the garnishee was not properly served, but owes Miss Benoski, there seems to be no reason why she should not collect what is due her from the garnishee without action.

Second. It is claimed that the attachment bond is defective because signed in behalf of the Adams Company by a person who styles himself "manager" of the company, who also signs individually, as surety.

It is said that it does not appear that the "manager" of this company had authority to bind it by signing the bond. Evidence may have been taken upon this point in the court below, which satisfied said court that the bond was good.

Having no bill of exceptions, we can not tell what the fact is, in this respect, so this point can not be intelligently passed upon. Judgment affirmed.

VALIDITY OF THE CRUELTY TO ANIMALS STATUTE.

Circuit Court of Cuyahoga County.

J. B. GIBBS v. STATE OF OHIO.

Decided, May 8, 1911.

Constitutional Law—Cruelty to Animals.

Section 13376, General Code, providing for the punishment of one found guilty of cruelty to animals, as therein specified, is constitutional.

Spear, Mills & Godfrey, for plaintiff in error.

T. H. Bushnell, contra.

WINCH, J.; HENRY, J., and JONES, J. (sitting in place of Marvin, J.), concur.

Gibbs was charged before a justice of the peace with cruelty to animals, tried without a jury, found guilty and fined ten dollars.

The common pleas court affirmed said judgment and the case is here for review, without bill of exceptions, the only claim made in this court being that the statutes under which Gibbs was convicted are unconstitutional.

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Section 13376, General Code, as amended April 13, 1910 (101 O. L., 118), provides that one guilty of cruelty to animals as therein specified, "shall be fined not less than two dollars and not more than two hundred dollars for the first offense, and for each subsequent offense such persons shall be fined not less than ten dollars nor more than two hundred dollars and imprisoned not more than sixty days or both.

Sections 13432 to 13434, General Code, inclusive, provide for trial by jury in prosecutions before a justice of the peace, when imprisonment is a part of the punishment.

Section 13435, General Code, provides that:

"In such prosecutions, where a different punishment is provided for a second or subsequent offense, the information or affidavit upon which the prosecution is based, must charge that it is the second or subsequent offense or the punishment shall be as for the first offense."

The affidavit in this case did not specify whether the offense charged was a first, second or subsequent offense.

It is urged that Section 13435, General Code, makes it possible for the person instituting a prosecution before a justice of the peace for an offense under Section 13376, General Code, to deprive the accused of trial by jury by neglecting to charge a second or subsequent offense under the statute.

This is claimed to be a delegation of legislative or judicial power to the prosecuting witness, inhibited by the Constitution.

We hold, however, that it is a rule of practice and procedure, constitutionally enacted for the benefit of the accused, protecting him against a sentence of imprisonment, unless the information or affidavit distinctly charge a second or subsequent offense.

Gibbs was tried as for a first offense; his punishment does not include imprisonment; had the law made no severer punishment for a second or subsequent offense, no claim would be made that any of his constitutional rights were infringed.

We fail to see what difference it makes to him that if he had been tried for some other and different offense, he might have had a trial by jury.

Judgment affirmed.

NEEDS OF CHILDREN MUST BE KNOWN BY FATHER.

Circuit Court of Medina County.

CHARLES MOORE V. STATE OF OHIO.

Decided, September 26, 1910.

Neglecting Minor Children—Duty of Father to Know Children's Condition—Misconduct of Counsel.

1. A father is bound at his peril to know when his minor children need further provision for their home, care, food or clothing, and to see that such provision, when needed, is made, if he is able to make it, and it is no defense in an action for neglecting minor children, that the father did not have notice from the mother or person having the custody of the children that they required his assistance.
2. A judgment of conviction in a criminal case will be reversed for misconduct of counsel, though the jury be cautioned with respect thereto, if on the whole record it is not clear that the defendant was guilty beyond a reasonable doubt.

William Gordon and C. N. Russell, for plaintiff in error.

N. H. McClure and C. H. Curtiss, contra.

HENRY, J.; WINCH, J., and MARVIN, J., concur.

At the April, 1910, term of the Medina county common pleas court Charles Moore was convicted of neglecting and refusing to provide his minor children, 12 and 6 years of age, with necessary clothing, food and proper home, between May 1, 1908, and April 4, 1910. Motion for new trial was overruled and he was sentenced to be imprisoned in the county jail of Medina county at hard labor for the term of six months, and to pay the costs of his prosecution. He afterwards entered into a bond to the state of Ohio in the sum of \$500 in accordance with the statute, to pay or cause to be paid to Zaidee Rasor, the mother of said child (who was appointed by the court a trustee for that purpose), the sum of \$1.25 per week for each of said children, until it shall become sixteen years of age.

To this judgment error is prosecuted upon the grounds of misconduct of counsel in argument to the jury; misdirection of

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the jury by the court, and the refusal of divers requests to charge.

The evidence discloses that the parents of these children were divorced by decree of the Court of Common Pleas of Portage County at its January term, 1907, upon the petition of the wife and upon the ground of habitual drunkenness of the husband. This decree, which was put in evidence, confided the custody, care, education and control of said children to their mother, and enjoined the father "from interfering in any manner with either of said children or with plaintiff in the custody, care, education and nurture of them, until further order of this court."

The mother thereafter removed to Medina county where she supported herself and the said children until her marriage to one Rasor, and since that time she and the said Rasor have supported them.

December 28, 1909, the mother of the children, through her attorney, wrote the defendant below as follows:

"There are two children of yours in this town residing with their mother who is divorced from you. You have done nothing as to the support and maintenance of these children for years. It is true that an allowance of alimony was given your former wife, but no provision was made in decree of divorce as to support of children, and you are accordingly still bound to support them. You are requested to do so. There is a criminal statute as to non-support of which you may be aware. However, we desire that you do what is lawful and proper without resort to extreme measures. You should make reasonable payment for board and clothing for your children. You are requested to take the matter up with me further."

Meanwhile the defendant below, Charles Moore, has also remarried and has removed from Portage to Summit county, where he was arrested and brought to Medina county for trial.

We find upon consideration of the record and of the precedents that the decision of our Supreme Court in the *State of Ohio v. Sanner*, 81 Ohio St., 393, fully answers the intimation from the bench on the hearing that the next to the last clause of Section 10 of Article I of the Constitution of Ohio, providing that an accused person shall have "a speedy public trial by an impartial

jury of the county or district in which the offense is alleged to have been committed" might preclude the trial for this offense in Medina county of one who had not at any time been in that county and whose children were brought there without his procurement.

The syllabus in *State v. Sanner, supra*, is as follows:

"As to some crimes, the physical presence of the accused at the place where the crime is committed, is not essential to his guilt.

"A parent may be guilty of the crime of failing to provide for his minor children, defined by the act entitled an act to compel parents to maintain their children, passed April 28, 1908 (99 Ohio Laws, 228), although he is a resident of another state during the time laid in the indictment and the venue of the crime is in the county where the child is when the complaint is made."

It is also established in this state that:

"The obligation of the father to provide reasonably for the support of his minor child, until the latter is in a condition to provide for his own support, is not impaired by a decree which divorces the wife *a vinculo* on account of the husband's misconduct, gives to her the custody, care and nurture of the child, and allows her a sum of money as alimony, but with no provision for the child's support. The mother may recover a reasonable compensation from the father for necessities furnished by her to the child after such decree, and may maintain an original action for such compensation against the father, in a court other than that in which the divorce was granted." *Pretzinger v. Pretzinger*, 45 Ohio St., 452.

Nor is it a defense to a prosecution, under the act here invoked, that an agreement of separation was entered into by the accused and his wife, by which the latter, who was given the custody of their minor children, agreed, for a valuable consideration, to furnish them with proper support, and that after the mother became unable to support the children, the accused offered to support them, if she would surrender their custody to him, which she refused to do (*Bowen v. State*, 56 Ohio St., 235). In the *per curiam* opinion at page 239 it is pointed out, that the duty which a father "owes the public of saving it from the expense of supporting his children, is personal and continuing, and

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can not be affected by any agreement he may make with another. He must answer to the state for his omission of that duty, and look to the other contracting party for any breach of the contract."

So in *State v. Stouffer*, 65 Ohio St., 47, it is held:

"The father is not absolved from his obligation to support his minor child under sixteen years of age, because his divorced wife, having its custody, has provided it with sufficient support; and his refusal and neglect, after demand, to furnish the child with proper support, he being able to do so, renders him amenable to the provisions of Section 3140-2 of the Revised Statutes."

In *State v. Teale*, 77 Ohio St., 77, it is held that:

"In the prosecution under Section 3140-2, Revised Statutes, against a father for failure to support his child, he being able to do so, it is not necessary for the state to prove that a demand was made upon the father for the performance of the duty enjoined by the statute."

Not all of these cases are entirely in point here, but they serve to indicate the principles which our Supreme Court has applied in construing this salutary act.

It is evident that the requests of defendants below, numbered 1 and 2, for a verdict of not guilty, upon the ground that the duty of maintaining the children had been cast upon the mother by the decree of divorce, were properly refused. The same is true of the third request, based upon the absence of evidence showing that the children had been actually neglected. The fourth request proceeds upon a theory directly contrary to that announced in *State v. Teale*, *supra*, and was, therefore, properly refused.

The fifth request is as follows:

"You are instructed that by the decree of the Court of Common Pleas of Portage County, the defendant is enjoined from interfering with the care, custody and nurture of said children by their mother and that he would be liable to punishment for contempt of court if he disregarded or disobeyed the terms of said decree."

It will be observed that this request is not addressed to the issue of guilt or innocence to which the jury in the court below were

confined. It is unnecessary for us to consider whether the request is abstractly correct or not, for it could not have aided the jury had it been given.

The sixth request is as follows:

“Before you can find the defendant guilty in this case, you must find from the evidence, beyond a reasonable doubt, that the defendant, Charles Moore, was able by reason of his having means, or of his ability to work and earn money, to provide said children with proper home, care, food or clothing, and that he has knowingly and wilfully refused or neglected so to do, after knowledge or notice to him, from the mother or person having the custody of said children, to do so.”

We think the defendant is bound at his peril to know when his children need further provision for their home, care, food or clothing, and to see that such provision, when needed, is made.

In the course of the argument to the jury by Mr. Curtiss on behalf of the state, several improper observations were made, culminating in this statement, wholly unwarranted by the evidence:

“The defendant had not contributed one cent to the support of the children before the divorce was granted.”

To this the defendant below objected and the court by way of admonition to counsel said:

“I would disregard all reference as to what had preceded the divorce. On your side of the case, I will say this, that you need to go no farther into that, any more than on the other side they should go into the grounds.”

There was clearly misconduct of counsel in the statements above quoted, and in other statements disclosed by the record, and the rulings of the court thereon are not such as to correct the prejudice, if any there was, resulting therefrom.

We have thoroughly canvassed the suggestion that the defendant's guilt being apparent from the whole record, he can not be deemed to have been prejudiced by counsel's misconduct. We are not prepared to acquiesce in this view. The children's step-father testifies that he furnished them with food between the serving of the notice upon the accused to provide for their sup-

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port and the time of the latter's indictment and trial some three or four months thereafter, and that he has no bill against the accused therefor. It does not anywhere appear that the children were during that interval in need of, or that they received from any source, any clothing. As regards home and care, it was obviously impossible, in the nature of things, for the husband to afford either to his children who had been confided to the custody of the former wife. While we are not prepared as a matter of law to say that the injunction forbidding him to interfere with the "custody, care, education and nurture of the children" absolved him from criminal liability for failure to provide them with proper "home, care, food and clothing," it is by no means clear upon all the facts in the case, that the defendant below was guilty of a violation of the statute.

Moreover, there is some evidence tending to show that the defendant was not physically and pecuniarily able to maintain his children; and while this evidence is far from conclusive, it, too prevents us from saying, as a matter of law, that he is guilty beyond a reasonable doubt, and therefore not prejudiced by counsel's misconduct.

For the reason noted, to-wit, the misconduct of counsel for the state in argument to the jury, the judgment of the court of common pleas is reversed and the cause remanded.

We feel disposed, in this connection, to add that the final arrangement in which the trial below resulted undoubtedly provides for the performance by the defendant below of his natural and legal duty to his children, as in the end he will have to perform it, no matter how this litigation may terminate.

INVALIDITY OF THE MOTOR VEHICLE LICENSE LAW.

Court of Appeals for Franklin County.

**CHARLES H. GRAVES V. CHARLES C. JANES AND THE OHIO
AUTOMOBILE ASSOCIATION.***

Decided, February 7, 1914.

*Constitutional Law—Invalid Sections of the Motor Vehicle License Act
—Repealing Sections Void and Former Sections Restored—103 O.
L., 763.*

1. Section 6294, General Code, as amended (103 O. L., 763), providing for graded license fees for the use of motor vehicles upon public highways, and Section 3609 (6309), General Code, manifesting the legislative purpose, are unconstitutional and void.
2. These sections being unconstitutional, the repealing clause is to that extent void, and the former sections are therefore revived.
3. Section 6294, General Code, and Section 6309, General Code, as they existed prior to the act of 1910 (103 O. L., 763), are constitutional and therefore operative.

Timothy S. Hogan, Attorney-General, and *James I. Boulger*, for plaintiff in error.

C. D. Saviers, H. L. Gordon and R. L. Lee, contra.

ALLREAD, J.; FERNEDING, J., and KUNKLE, J., concur.

This action involves the constitutionality of the Automobile License Act of 1903 (103 O. L., 763), providing for a system of identification and registry of motor vehicles and the annual payment of certain graded license fees.

The act under consideration is an amendment to an act upon the same subject passed in 1908, amended in 1909 and embodied in the General Code as Sections 6290 to 6310 inclusive.

The main features of the act of 1913 are to bring in motor-bicycles and motorcycles, increase the license upon gasoline and steam cars according to horse power, increase the flat rate upon electrics and upon manufacturers, dealers and chauffeurs; and

*Affirming, with modifications, *Janes v. Ohio State Automobile Co. et al*, 15 N.P.(N.S.), 193.

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to leave substantially two-thirds of the total receipts in the general revenue fund of the state.

The constitutionality of the act under consideration is challenged chiefly upon the following grounds:

- (1) Want of legislative power upon the general subject-matter.
- (2) Unlawful discrimination, and
- (3) Illegality and unreasonableness in the amount and the purpose of the fee exacted.

We think the power of the General Assembly to prescribe a license fee for vehicles using the highways of the state or those whose use thereof creates a special burden, is clearly supported by reason and authority.

From the foundation of our state the public highways have been largely maintained by general taxation. The general principle underlying this system of road improvement was the general public welfare and the approximate equality of the benefits as represented by the taxable property of individuals. The condition in the earlier history of the state especially exemplifies the appropriateness of that form of taxation. In the development of the state a more expensive system of roads was demanded in the populous centers and the necessity or at least advisability arose of imposing a portion of the expense of maintaining the highways of the larger municipalities upon the owners of vehicles whose use of such highways was specially burdensome. The constitutionality of laws enacted for the purpose indicated was challenged and the power of the Legislature to enact such laws was sustained in the leading case of *Marmet v. State*, 45 O. S., 63.

In recent years new problems of road building and repair have arisen by the prevalent use of motor vehicles and this problem has been increased by the skill of the inventor and the manufacturer in building practical cars of high power and speed. The state is, therefore, confronted with the necessity or expediency of building better roads for the accommodation of this new method of travel, of providing for the increased expenses of repairs upon highways by reason of this new use, to preserve

the highways in repair for all kinds of travel, and of establishing proper police regulation.

In the case of *Cincinnati v. Bryson*, 15 Ohio, 625, where the right of the state to authorize cities to charge a license fee upon the use of drays, hacks, omnibuses and other heavy vehicles was involved, Birchard, J., says:

“It is manifest to every one, that, in a large city, vehicles of this description cause great destruction to the public ways—far greater than the usual ordinary travel of citizens otherwise employed. There is, therefore, no injustice in exacting a reasonable portion of the expenses which such special occupations cause to the community; and those who enjoy the special privilege, can refuse to bear a reasonable portion of the burden but with an ill grace.”

In the case of *Marmet v. State*, *supra*, the general legislative authority in respect to vehicle license tax is defined as follows:

“The General Assembly has power * * * to regulate occupations by license and to compel by imposition of a fine, payment of a reasonable fee where special benefit is conferred by the public upon those who follow an occupation or where the occupation imposes special burdens on the public or where it is injurious to or dangerous to the public.”

While there is an intimation of doubt expressed by Price, J., in the case of *Pegg v. City of Columbus*, 80 O. S., page 383, yet we think the right to enact a license law including a reasonable charge as a privilege tax is clearly established in this state.

It is also claimed that the act is discriminatory and in violation of the uniformity clause of the Constitution. This contention is founded upon the general exemption of horse drawn vehicles and certain motor vehicles.

The uniformity clause of the Constitution does not prevent reasonable classification of the subjects of legislation. Motor vehicles are a just subject of classification in respect to the use of public highways as distinguished from horse drawn vehicles. No better statement of this proposition can be made than that found in the opinion of Spear, J., in the case of *Allen v. Smith*, 84 O. S., 283, as follows:

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“Doesn't everybody know that the automobile is a new machine of travel; its use a new use of the highways; that it is dangerous to other travelers; that its power, its capacity for speed, the temptation it affords the reckless driver to operate it at a dangerous rate and in a careless manner, all distinguish the automobile from all other vehicles. Surely it can not be necessary to further elaborate this fact so patent to every observing and reading person. The automobile is, therefore, a class by itself, the users of such machines a class by themselves, and legislation in recognition of this condition is based upon solid easily recognized distinctions.”

This classification deals more especially with the necessity of police regulation. The burden of highway maintenance as between motor vehicles and horse drawn vehicles is as clearly pronounced.

Reference is made in the briefs to the burden of the heavier of the horse drawn vehicles as compared with automobiles. Even this comparison does not eliminate a reasonable foundation for distinction. Horse drawn vehicles move slowly and are necessarily confined to a limited mileage, so that the total of the wear upon the highways and the amount of necessary police regulation of horse drawn vehicles is materially less than that of motor vehicles. It is, however, contended that there is unjust and unfair discrimination in the special exemptions of certain motor vehicles. The reason for the exemption in favor of fire engines, fire trucks and police patrol wagons which are governmental agencies maintained by general taxation is manifest. Road rollers which are used largely by public authority for road purposes, may be exempted for the same reason. Public ambulances includes those owned by public authorities as well as those privately owned, but may legitimately be excepted because of the public welfare involved in their use. It would be strange, indeed, if not an anomaly in the administration of government if a tax be imposed upon vehicles so used.

The exemption of traction engines is particularly complained of. The court will take judicial notice that these engines are generally used for power purposes in threshing grain and the like and that their use of the highways is merely incidental. The speed is low and the total mileage of travel small. A tour-

ing car will travel almost as many miles of highway in a single day as the traction engine will travel in the course of an entire season. Besides the very useful purpose of the traction engine and its relation to the production of food supplies for the citizens of the state may furnish grounds for legislative classification. This feature is fully discussed by Spear, J., in the case of *Marmet v. State, supra*.

Street cars and vehicles operated upon fixed tracks are already specially taxed and may therefore be exempted from this act.

There is complaint of the uncertainty and inaccuracy of the basis of horse power rating established in the act in respect to steam and gasoline cars. While this is a subject for judicial notice, yet the court has been favored with evidence bearing upon this feature. From the evidence we are advised that the basis of horse power rating adopted by the act is well recognized and has been employed by leading manufacturers, and while in the recent development of engine making there may be some inaccuracy, still we think this basis is sufficiently definite to justify legislative adoption. The standard adopted is a formula. There is no delegation of power. The formula existing at the time of the enactment continues until changed by the Legislature. There is also sufficient reason for the flat rate charges upon electrics. The electrics in general use are comparatively slow moving and of low horse power. While it may be true that electrics of high speed have been constructed, yet it is equally true that they are not in general use. Should they become so, it will be ample time for the Legislature to act.

This brings us to a consideration of the amount and legality of the license charge. This feature is the most difficult of solution. The identification and registry of motor vehicles has a legitimate purpose, but it is clear that the charge provided for in the act under consideration goes far beyond this purpose. The act clearly contemplates other purposes and such purposes must be ascertained and their legality determined by constitutional limitations. It is apparent from the entire act that in addition to identification and registry, the privilege of the use of the roads by motor vehicles and of police regulation thereon is con-

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templated. The imposition of a reasonable charge for reimbursement for road maintenance and repair and for policing the road in view of the special uses contemplated by the act is warranted by the general grant of legislative power. This is not a property tax but a privilege tax. The reasonableness of a privilege tax is confided largely to the discretion of the General Assembly, but for the abuse of such legislative power, a final review is in the courts.

The opinion of the court in reviewing the power to levy excise taxes in the case of *Southern Gum Company v. Laylin*, 66 O. S., 578, is illustrative. But the case of *Pegg v. City of Columbus*, *supra*, where the whole scope of the reasonableness of the act then under consideration was reviewed is analogous and directly in point. The right of the use of the public ways of the state is in a measure inherent in every citizen, but clearly that right may be regulated to subserve the interests of the public welfare. When, therefore, the Legislature clearly exceeds the limit of reasonable taxation for the privilege conferred or the burden resulting or when the charge imposed is clearly founded upon an improper basis for an unwarranted purpose, it is the duty of the courts to declare the act invalid.

Section 3609 requires the revenue derived from registration fees to be applied to the expenses of the registry department and the surplus paid into the state treasury. The act provides that one-third of the revenue paid into the state treasury

“Shall be used for the repair, maintenance, protection, policing and patrolling of the public roads and highways of this state under the direction, supervision and control of the state highway department.”

No special provision having been made for the other two-thirds of this revenue, it remains in the general revenue fund. It is true that the general revenue fund is subject to special appropriation for any lawful purpose. But we can not escape the conclusion that the manifest purpose of the General Assembly in appropriating expressly for highway purposes, including both maintenance and policing but one-third of such revenue and leaving the other two-thirds in the general revenue fund of the

state clearly discloses an intention upon the part of the General Assembly to raise the larger portion of this fund for general revenue purposes. The act is therefore, to that extent, a general revenue measure.

What further special burden or benefit than that provided for in the special appropriation for road purposes is involved in the use of highways by motor vehicles upon which to found a legitimate right to tax them for general revenue? Increased litigation in the criminal and civil courts would probably support an allotment of some share to the general revenue fund. But that consideration would not of itself justify the large portion of this tax devoted to general revenue. Nor, can we conceive of any other reason justifying it.

The cases of *State, ex rel v. Ferris*, 53 O. S., 314, and *Ashley v. Ryan*, 53 O. S., 504, are cited to support the contention that the power to levy an excise tax involves by implication the right to appropriate the tax to the general revenue fund.

The vehicle tax involved in the act under consideration does not rest upon the same basis as the excise tax involved in the cases cited.

The authorities in this state do not attempt to classify vehicle tax as an excise tax, but it is rather considered to be a special privilege tax imposed as compensation for special burdens and inconveniences.

In all cases involving vehicle license taxes brought before the Supreme Court the revenues were appropriated to highway uses and this case brings up for the first time, so far as we are advised, before the courts of this state the question of the right to impose a vehicle tax wholly or partly for general revenue.

We are, therefore, forced to the conclusion that the act under consideration so far as it applies to the owners and users of motor vehicles is, in large part, a general revenue measure and to that extent is unconstitutional and void. The unconstitutional or revenue features of the act not being separate, vitiates the entire provision of the act to owners and users.

In view of our finding as to the unconstitutionality of the act we do not feel justified in expressing an opinion as to whether the schedule of fees therein provided is so clearly excessive as to

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warrant a court in declaring the same invalid, if the Legislature had expressly declared it necessary to raise such entire fund for the purpose of maintaining, repairing and policing the public highways and had appropriated the entire amount so raised less the cost of maintaining the department to such uses.

The main and controlling object of the amendment of 1913, being void, the repealing act to that extent is void and the corresponding sections of the former act are revived. All the main features of the present act except the general revenue feature are involved in the former act. Having that in view, we have considered the general features applicable to the former act and find no constitutional infirmity. The section of the former act defining motor vehicles includes among the exceptions motor bicycles and motorcycles in addition to those of the present act. That motorcycles and motor bicycles may be separately classified, we think is apparent.

Section 6302 of the act of 1913, in respect to license for chauffeurs is clearly constitutional.

Section 6301 of the act of 1913, imposes a flat rate upon manufacturers and dealers in motor vehicles. This rate is not apparently excessive and no particular argument has been made against it. It is also more in the nature of an occupation tax and we therefore sustain that section, notwithstanding the provision as to the application of the fund.

The injunction allowed in the court of common pleas should be modified and limited so as to conform to this opinion and as so modified will be affirmed.

Gerthung v. Stambaugh-Thompson Co. [Vol. 18 (N.S.)]

**TEST OF LIABILITY UNDER THE WORKMEN'S
COMPENSATION ACT.**

Court of Appeals for Mahoning County.

BARNHART GERTHUNG V. THE STAMBAUGH-THOMPSON CO.

Decided, December 8, 1913.

*Workmen's Compensation Act—Takes from Employer Certain Defenses
—But Does Not Enlarge Basis of Recovery Beyond Common Law
Rule—Test as to Liability.*

1. The Workmen's Compensation Act, General Code, Section 1465-60 (102 O. L., 529, Section 21-1) which provides that an employer of five or more workmen, who has not paid the premiums prescribed by said act, shall be liable in damages to any employee for injury caused by "the wrongful act, neglect or default" of such employer, his officers, agents or other employees, take away the defenses of the fellow-servant rule, contributory negligence and assumption of risk, but does not enlarge the basis for recovery on the grounds of negligence beyond what it existed at common law, and the employer is only required to exercise ordinary care under all the circumstances of the case.
2. The only test of liability under such sections is whether the employer exercised the degree of care that ordinarily prudent persons are accustomed to exercise under the same or similar circumstances.

W. R. Stewart, for plaintiff in error.

Arrel, Wilson, Harrington & DeFord, contra.

NORRIS, J.; POLLOCK, J., and METCALFE, J., concur.

Plaintiff in error was plaintiff below and brought suit against the defendant in error for personal injuries which he claims to have sustained while in the employ of the defendant in error, by reason of its negligence in not furnishing a proper horse for him to drive. The petition further states that at the time of receiving the injuries the defendant had not availed itself of the compensation act or paid into the insurance fund of the state any premium or money, as provided by statute, although defendant employed regularly more than five workmen in and about its establishment.

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The answer admitted the employment of the plaintiff and set up other defenses, and further denied that it was one of the employers contemplated under the compensation act and denied that it was in any way controlled by said act, or that in so far as the defendant is concerned it has any force, value or application.

The case was tried to a jury and evidence offered tending to support the allegations of the petition, and that the defendant did at that time employ more than five men in and about its establishment. At the close of the evidence the plaintiff requested the court to charge the jury before argument certain propositions of law separately. The first which was given was as follows:

“The court instructs you, as a jury, if you find from a preponderance of the weight of the evidence that the defendant, at the time of the occurrence of the injury to the plaintiff, had in its employ, five or more workmen regularly in the same business, or in and about the same establishment, and further that the defendant, at that time had not paid any premium into the state insurance fund of Ohio, then, as a matter of law, the defendant is liable to the plaintiff for any injury sustained by him in the course of his employment by the negligence of the defendant, or any of the defendant's officers, agents or employees.”

The plaintiff also asked that the following instruction be given to the jury, which was refused and exception noted:

“The court says to you in this action, if you find that the defendant has not availed itself of the Workmen's Compensation Act, the test of liability is not whether the employer exercised ordinary care in the situation complained of, but whether said employer, the defendant, was guilty of any wrongful act, neglect or default which caused plaintiff's injuries.”

The refusal of the court to give this last request is the only error assigned in the record. It is claimed on the part of the plaintiff in error that by virtue of Section 1465-60 of the General Code, known as part of the Workmen's Compensation Act, that a different and higher degree of care is required of employers who are within the province of that act and do not pay into the state insurance fund the premium provided for by said act.

That section reads as follows:

“All employers who employ five or more workmen or operatives regularly in the same business, or in and about the same establishment, who shall not pay into the state insurance fund the premiums provided by this act, shall be liable to their employees for damages suffered by reason of personal injuries sustained in the course of employment caused by the wrongful act, neglect or default of the employer, or any of the employer’s officers, agents or employees, and also to the personal representatives of such employees, where death results from such injuries, and in such action the defendant shall not avail himself or itself of the following common law defenses: The defense of the fellow-servant rule, the defense of the assumption of risk or the defense of contributory negligence.”

The expressed purpose of that section seems to be to take away from employers who do not avail themselves of the act, the common law defenses of the fellow-servant rule, the defense of the assumption of risk, and the defense of contributory negligence.

Does the act in addition to that require a higher degree of care than was required at common law? Or, in other words, is the employer, failing to pay the premium required by the act, required to exercise more than ordinary care under the circumstances of the particular case? It will be noticed that this clause, making the employer liable for personal injuries sustained in the course of employment caused by the wrongful act, neglect or default of the employer, is taken substantially from the wrongful death statute, which is Section 10770, which reads in part:

“When the death of a person is caused by wrongful act, neglect or default such as would have entitled the party injured to maintain an action and recover damages in respect thereof, if death had not ensued, etc., a recovery may be had.”

It has always been held under that statute that the want of ordinary care under the circumstances was the test of liability when a question of negligence was involved in the case. It nowhere appears in the compensation act that the Legislature intended, in using those words, that they should have any different meaning than that which has heretofore been given them by the courts of the state. Indeed, we do not think the courts of Ohio have given any sanction to the attempted fine distinction between

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the degrees of negligence which are sometimes named as grounds as slight, gross or ordinary.

Commencing in the case of *Railroad Company v. Terry*, 8 O. S., 570, reading from page 581 from the opinion of the court, it is said:

“It is obvious from this definition that the ordinary care required by the rule, has not only an absolute, but also a relative signification. It is to be such care as prudent persons are accustomed to exercise, under the peculiar circumstances of each case. If called into exercise under circumstances of peculiar peril, a greater amount of care is required than where the circumstances are less perilous; because prudent and careful persons, having in view the object to be obtained, and the just rights of others, are in such cases, accustomed to exercise more care than in cases less perilous. The amount of care is indeed increased, but the standard is still the same. It is still nothing more than ordinary care under the circumstances of that particular case. The circumstances, then, are to be regarded in determining whether ordinary care has been exercised.”

To the same effect is *Wiser v. Railroad Company*, 6 Cir. Dec., 215, in which the court quotes from the case in the 8 O. S. Again, in the case of *Railway Company v. Elliott*, 28 O. S., 340, reading from the opinion of the court on page 357, it is said:

“A large amount of learning is developed in the books, upon the subject of the various degrees of care and their corresponding phases of negligence. It may perhaps be doubted whether the elaborate attempts to define the exact distinctions between the adjectives slight, ordinary and gross do not tend, not only to mislead juries, but sometimes to result even in judicial confusion.”

And further the court say:

“There is pertinency in the remark of Baron Rolfe, *Wilson v. Britt*, 11 M. & W., 113, and Willis, in L. R., 1 C. P., 640, that gross negligence is merely negligence with the addition of a vituperative epithet. When it is said that a person must exercise ordinary care, the statement is so plain in its language and so simple in the idea to be conveyed, that if the proposition is not comprehended in this form, mere words will probably occasion less intelligence.”

Again, to the same effect is *Telegraph Company v. Griswold*, 37 O. S., in which the Supreme Court quoted from Lord Denman:

“When we find gross negligence made the criterion to determine the liability of a common carrier who has given the usual notice, it might perhaps have been reasonably expected that something like a definite meaning should have been given to the expression. It is believed, however, that in none of the numerous cases on this subject is any such attempt made, and it may well be doubted whether between gross negligence and negligence merely, any intelligible distinction exists.”

To the same effect is *Harriman v. Railway Company*, 45 O. S., 11, and *Railroad Company v. Webb*, 12 O. S., 475-496.

The doctrine of the Ohio cases cited is supported by the Supreme Court of United States in the case of *Railway Company v. Arms*, 91 U. S., 489-494.

From these authorities we are lead to the conclusion that the rule which has prevailed in Ohio as to the amount of care required, may be different in and under different conditions, but that the degree required is that of ordinary care under all circumstances. As said in one of the cases, the degree of care where a person operates a railroad train going through the country at a high rate of speed is greater in amount than that of a person who runs a stage coach, but in both instances it is the degree of care that ordinarily prudent persons are ordinarily accustomed to exercise under the same or similar circumstances. But we find this question is settled by our own Supreme Court in the case of *State, ex rel, v. Creamer*, 85 O. S., 349. Reading from the opinion on page 386, it is said in construing this statute:

“Employers of five or more who do not pay premiums into the fund are deprived in actions against them of the common law defenses of the fellow-servant rule, the assumption of risk and of contributory negligence.”

It is not intimated that they are also held to a higher degree of care. Again, on page 392:

“All employers who shall not pay into the insurance fund, etc., shall be liable to their employees for damages, etc., caused by the wrongful act, neglect or default of the employer, his

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agents, etc., and in such cases the defenses of assumption of risk, fellow-servant and contributory negligence are not available. So that an employer who elects not to come into the plan of insurance may still escape liability if he is not guilty of wrongful act, neglect or default. His liability is not absolute as in the case of the New York statute hereinafter referred to. And it can not be said that the withdrawal of the defenses of assumption of risk, fellow-servant and contributory negligence, as against an employer who does not go into the plan, is coercive, for withdrawal is in harmony with the legislative policy of the state for a number of years past."

Now, if this act also held the employer to a higher degree of care because of his failure to go into the plan of insurance, it seems to us that the Supreme Court would have referred to that fact, and such finding might have led the court to a different decision as to the constitutionality of the act.

Again, on page 393:

"As to the employee, if the parties do not elect to operate under the act, he has his remedy for the neglect, wrongful act or default of his employer and agents as before the law was passed, and is not subject to the defenses named."

Our attention has been called to the case of *Schafer v. C. B. T. Company*, 13 N.P.(N.S.), 553, where the Superior Court of Cincinnati reached a different construction of that section. We think the decision in that case is in conflict with the authorities we have cited and many others that might be noted, and that the section in question if the employer does not pay the premium required in the insurance act, is only held to the exercise of ordinary care under the circumstances as heretofore defined in Ohio.

The judgment will be affirmed.

ACTION AGAINST RAILWAY COMPANY FOR FIRE LOSS.

Court of Appeals for Wood County.

THE HANOVER INSURANCE COMPANY ET AL V. THE CINCINNATI,
HAMILTON & DAYTON RAILWAY COMPANY.

Decided, May 8, 1913.

Railways—Failure to Show that Building Was Fired by Passing Locomotive—Character of Proof Required to Establish Such an Allegation.

In an action against a railway company for loss of property by fire, alleged to have been started on land adjoining the right-of-way by sparks from a passing locomotive, in order to establish a *prima facie* case of negligence under the act of April 26th, 1894, 91 O. L., 187, it must be shown by affirmative evidence that the fire was caused by sparks from a locomotive which was being operated on the defendant company's road, and this evidence must be sufficiently convincing to warrant the jury in finding that the fire was so caused.

Benj. F. James, for plaintiffs.

N. R. Harrington, contra.

CHITTENDEN, J.; KINKADE, J., and RICHARDS, J., concur.

Error to the Court of Common Pleas of Wood County, Ohio.

This action was begun in the common pleas court to recover damages alleged to have been sustained by the burning of a building belonging to one of the plaintiffs, F. M. G. Seibert, and which building was alleged to have been fired by sparks emitted by an engine of the defendant company while passing along the property of said plaintiff adjacent to the right-of-way of the defendant company. The fire is alleged to have occurred on or about April 25th, 1909. The defendant claims not to have caused the fire, and further that its engines were equipped with the most effectual device for preventing the escape of fire and sparks therefrom. There were joined in this action as plaintiffs two insurance companies who had paid to the plaintiff Seibert the amount of insurance carried by their respective companies.

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The plaintiff Seibert claims a loss in excess of his insurance indemnity.

Upon trial of the action the jury returned a verdict in favor of the defendant. A motion for a new trial filed by the plaintiffs was overruled and judgment entered upon the verdict. This proceeding is to secure a reversal of such judgment.

The principal errors complained of are that the verdict and judgment are against the weight of the evidence, and that the court erred in its charge to the jury, especially in giving the written charges requested by defendant before argument.

In order that the plaintiffs might recover in this action it was incumbent upon them to prove that the fire was caused in whole or in part by sparks from an engine upon or passing over or along the railroad while the defendant was operating it. Such proof when made, establishes a *prima facie* case of negligence upon the part of the defendant, but such *prima facie* case is only made by the proof of such fact by affirmative evidence that would justify the jury in finding that the fire was so caused.

The Supreme Court of Ohio in *Cleveland Terminal & Valley Railroad Company v. Marsh*, 63 O. S., 236, holds:

“To establish negligence there should be either direct proof of the facts constituting such negligence or proof of facts from which negligence may be reasonably presumed. There should be no guessing by either court or jury.”

A careful examination of the evidence as disclosed by the record in this case shows that the jury would be entirely justified in finding that the plaintiffs did fail to prove by a preponderance of the evidence that the fire was caused by sparks escaping from a passing locomotive. In fact we are of the opinion that the evidence would not justify any other finding upon this issue of fact.

The plaintiffs having failed in the proof in this essential fact, we find no error in the record prejudicial to the plaintiffs, and the judgment of the common pleas court is affirmed.

FUNDS WRONGFULLY DISTRIBUTED BY AN ADMINISTRATOR.

Court of Appeals for Wayne County.

MARY HARBESON, ADMINISTRATRIX OF THE ESTATE OF SARAH C. FAIR, DECEASED, v. WILLIAM M. MELLINGER AND THE AMERICAN SURETY COMPANY OF NEW YORK.

Decided, February Term, 1913.

Estates of Decedents—Rights of a Widow Who Elects Not to Take—Administrator Liable for Illegal Distribution.

1. Costs connected with the administration of the estate of a decedent and other obligations incurred in that connection are "debts" of the estate.
2. The fact that, upon the filing of his account, the probate court discharged an administrator from all further liability on his bond as such administrator, does not release him or his surety from liability for wrongfully or illegally distributing any part of the personal estate.
3. A widow who elects not to take under the will of her deceased husband is entitled to only so much of the personalty belonging to the said estate as would have passed to her had her husband died intestate.

Frank Taggart, for plaintiff.

Kean & Adair, and *Mahlon Rouch*, contra.

SHIELDS, J.; VOORHEES, J., and MARRIOTT, J., concur.

This case is in this court on appeal from the judgment of the court of common pleas of this county and is submitted upon an agreed statement of facts. It is a suit brought by the plaintiff as administratrix of the estate of Sarah C. Fair, deceased, vs. William M. Mellinger and the American Surety Company of New York, defendants, to recover of the said defendants the widow's share of the personal estate of her husband, Christian Fair, deceased, who died June 14, 1903, leaving a last will and testament, containing, among other provisions, the following:

"Item 2. I hereby direct that after my death my children or their legal representatives shall pay my funeral expenses and all my other debts, and the residue of my estate not hereby be-

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queathed to my wife herein mentioned shall be equally divided among my children or their legal representatives.”

Said will also contained a provision devising to Sarah C. Fair, his wife, certain real estate therein described and the household effects together with certain other personal property therein referred to. It appears that said will was duly probated and that the said Sarah C. Fair as such widow did not elect to take the provisions of said will. She died February 1, 1904.

It also appears that the defendant, William C. Mellinger, was appointed administrator of the estate of said Christian Fair, deceased; that the defendant, the American Surety Company of New York, became surety on his bond as such administrator, and for the purpose of paying the debts of said decedent and the costs of administering his estate, the said Mellinger as such administrator sold the personal property and certain real estate of said decedent; and that the balance of the real estate of said decedent was divided between Malinda Ryland, Elizabeth Hyle and Sadie Piper, children of the said Christian Fair, deceased, in certain partition proceedings, with the knowledge of said administrator. That after paying all of said debts and the costs of administration, the said Mellinger as such administrator had in his hands of the personal estate of said decedent the sum of \$523.05, which said sum said administrator distributed to the legatees named in said will, but no part of which was paid or distributed to said widow. It also appears that among the assets of said estate was an insurance policy of \$1,000 on the life of one Dr. Lerch, which the said Christian Fair in his lifetime had become the owner of, and which said policy of insurance said administrator procured an order of the probate court to distribute in kind among said legatees who accepted the same. That no part of said insurance policy was paid or distributed to said widow. That afterward said administrator filed partial accounts in the probate court showing the distribution of said sum of money above referred to, and also his account showing the distribution of said insurance policy in kind among said legatees, which said accounts were by said probate court approved.

It is claimed on behalf of the widow that having declined to accept the provisions of said will by taking under the law she is entitled, under the laws of this state, to recover her share of the personal estate of the said Christian Fair, deceased, after said debts and costs of administration are paid, including her share as widow out of said insurance policy, while the defendant William M. Mellinger claims that he distributed said estate under the order of the probate court and is therefore discharged from all liability growing out of the administration of said estate.

The first inquiry which arises is, did said decedent leave any personal estate? The first item in said will indicates that he did, for he therein bequeaths certain personal property to his wife, and in addition to this, the agreed statement of facts shows that said administrator received from the sales of personal property the sum of \$523.05. As stated, the widow declined to accept the provisions of said will; hence in taking under the law she can only avail herself of the provisions of the law in respect to her rights as widow in the personal estate of the said Christian Fair, had he died intestate.

Section 10571, General Code, provides that:

“The election of the widow or widower to take under the will shall be entered upon the minutes of the court. If the widow or widower fails to make such election, she or he shall retain the dower, and such share of the personal estate of the deceased consort as she or he respectively would be entitled to by law in case the deceased consort had died intestate, leaving children.”

But it is claimed that inasmuch as the widow elected not to take the provisions of said will, she is barred of distribution in any of the moneys remaining in the hands of the administrator as personal property after the payment of the debts of the said decedent. Having elected not to take under said will, the widow of course is remitted alone to the provisions of the law, for she can not invoke the benefit of both. She must rely upon one or the other.

Item 2 in said will directs that “out of my estate my children shall pay my funeral expenses and all my other debts.”

It is contended by the defendants that the term “debts” as used here does not include the payment of costs of administer-

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ing said estate. In this contention we can not agree, for it is held that the term "debts" includes not only the debts that the testator was owing at the time of his decease, but also all that might accrue thereafter in the settlement of his estate. 14 O. S., 505-514.

Hence we are of the opinion that the costs of administering said estate, including all other estate obligations arising out of the same—obligations created by law—are debts payable by said estate within the meaning of the term "debts" used in said item.

Is the personal estate of the said decedent liable for the debts of the decedent? Ordinarily the personal estate of a decedent is primarily liable for the payment of his debts, unless in a case where there is a will the testator by express words or by manifest intention, excepts it. 34 W. S., 461-470; 14 O. S., 505-506; 8 Pa. St., 290-292.

From the first item of said will which gives to the widow certain real estate, and in substance his personal estate, it is apparent that the intention of the testator was that his personal estate should not be applied in discharge of his debts. In answer to this the defendants say that the widow having declined to take under the will, the case does not fall within the exception referred to in the authority cited, but does it not follow that the legatees named in said will having accepted the benefits thereunder, must likewise assume the burdens? As stated by the learned judge announcing the opinion in the case of *Case v. Hall's Administrator*, 52 O. S., 24-32 "that he who takes a benefit under a will must take it subject to its provisions; any other construction would necessarily defeat the intention of the testator."

In the case at bar it appears that the administrator, with the consent of the children, caused the personal property and certain portions of the real estate to be sold to pay the debts of the said decedent, and that after the payment of such debts and the costs and expenses of administering said estate, there was a balance of \$753.08 remaining in his hands, of which said sum the sum of \$523.05 was received from the sale of personal property belonging to said estate. This sum of \$503.05 is exclusive of the \$1,000 insurance policy on the life of Dr. Lerch, which it appears the said Christian Fair in his lifetime had become possessed of. It is claimed on behalf of the defendants that an application

was made by the administrator Mellinger to the probate court for an order authorizing him to distribute said insurance policy to said legatees in kind, and that after a hearing had said court granted said order, and upon report made by the administrator of such distribution, said court confirmed the same. It is claimed that the widow is concluded by these proceedings, and to sustain such claim, among others, counsel for defendants cite us to the case of *Eichelberger v. Gross*, 42 O. S., 549, and quote therefrom as follows:

“The judgments and orders of the probate court, including the approval of partial and final accounts of guardians, import absolute verity, between the parties thereto, and they can not be contradicted or questioned collaterally.”

We have no hesitancy in recognizing the probate court as to matters coming within its jurisdiction as a court of record, and that its judgments are of the same binding force as judgments in other courts, but such court must have jurisdiction of the parties to enable it to enter judgment. How was it here? The agreed statement of facts signed by the parties hereto shows that the administratrix of the estate of the widow was not a party to these proceedings; hence she could not be, nor was she bound thereby. 14 O. S., 424-433.

The mere fact that the probate court made an order discharging said administrator from all further liability on his bond as such, upon the filing of his final account, is immaterial and of no legal effect, if distribution of the personal estate of said decedent was wrongfully made, and under the facts as we find them in this case, we are of the opinion that such personal estate was illegally and wrongfully distributed, and that the widow of the said Christian Fair, deceased, is entitled under the law to her distributive share in the personal estate, that is, that the plaintiff as administratrix of Sarah C. Fair, is entitled to recover a judgment against the defendants William M. Mellinger and the American Surety Co. of New York for one-half of the present value of said insurance policy up to \$400, and one-third of the balance in excess of \$400, including also one-third of said sum of \$523.05, with interest on the sum so found to be due, from May 7, 1910. Exceptions noted.

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VALIDITY OF ELECTION OF OFFICERS OF A CORPORATION.

Circuit Court of Cuyahoga County.

THE STATE OF OHIO, EX REL HARRY S. FRENCH, v. J. B. CLOUGH.*

Decided, October 21, 1912.

Corporations—Failure at Annual Meeting to Elect New Directors—Authority of Hold-over Board to Elect New Officers—Notice of Directors Meeting for that Purpose Not Necessary, When—Section 8664.

1. In the event of failure at the annual stockholders' meeting to elect a new board of directors, the hold-over board has authority to proceed with the election of officers of the corporation, where the code of regulations of the company provides that officers and directors shall be elected for one year.
2. Where there is a fixed time for the holding of the annual meeting of the board of directors of a corporation, each director will be assumed to have notice thereof, and failure to notify all the directors that a meeting is to be held does not invalidate action taken at such meeting.

Wing, Myler & Turney, for plaintiff.

Smith, Taft & Arter, contra.

NIMAN, J.; WINCH, J., and MARVIN, J., concur.

This is an action in *quo warranto*, begun in this court, for the purposes of ousting the defendant, J. B. Clough, from the office of president and treasurer of the Machinery Forging Company, and having the relator, Harry S. French, adjudged entitled to said office.

The Machinery Forging Company is an Ohio corporation. By its code of regulations the annual meeting of the stockholders is held on the second Monday of August of each year. The number of directors is fixed at five.

At the annual meeting of stockholders held on the second Monday of August, 1912, there was a failure to elect a new board

*Affirmed without opinion, *State, ex rel French, v. Clough*, 88 Ohio State, —.

of directors by reason of an equal number of shares of stock having been voted in favor of six different persons. At the time of this meeting the board consisted of H. S. French, the relator, H. C. Kumraus, S. M. Sloan, J. B. Clough, the defendant, and B. L. Tappingden. At the time of the holding of the stockholders' annual meeting of 1912, the relator was the duly elected and qualified president and treasurer of said company.

Immediately after the adjournment of the stockholders' meeting, three of the old directors, Clough, Kumraus and Tappingden, constituting a quorum under the by-laws, having requested the relator to call a meeting of the board, and their request having been refused, met and proceeded to organize. They elected the defendant to the office of president and treasurer, and filled the other offices of the company. One director, S. M. Sloan, was given no notice of the meeting. The relator was aware of the fact that the three members of the board mentioned were holding a meeting. He was in the front of the office where the meeting was held part of the time, but refused to participate in the meeting, and denied the right of the three directors to hold such a meeting.

The defendant, after being elected president and treasurer of the company, and the other officers chosen took possession of the manufacturing plant and the other property of the corporation, and have since retained possession of the same.

The relator contends that the old board, having held over on account of the failure of the stockholders to elect a new board, was without legal authority to disturb him in his office of president and treasurer, and that the election or attempted election of the defendant to that office vested no right in him to exercise or enjoy the rights and privileges of such office. He contends, also, that if it should be held that the old board had power to elect new officers, the attempted exercise of that power was of no effect because no notice of the meeting was given to one of the directors, S. M. Sloan, who was not present at the meeting and had no actual knowledge of it.

In our opinion, if the members of the old board had power to elect new officers, the want of notice to a director of a meeting held at that time would not invalidate the action of the board.

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It is provided in the regulations of the company that the annual meeting of the stockholders shall be held on the second Monday in August, and in the by-laws of the board of directors it is provided that the regular annual meeting of directors shall be held at the office of the company on the second Monday of August. The time of the annual meeting of the board being thus fixed, and no actual notice thereof being required, each director must be assumed to have notice by reason of the time fixed in the by-law, itself. The rule on this subject is stated in *Thompson on Corporations* (Second Edition), Section 1131, in this language:

“There has been some controversy and doubt,” says Mr. Cook, “as to the necessity of giving notice of directors’ meetings. Many cases apply to directors’ meetings the same rules that apply to stockholders’ meetings. Other cases hold that less formality and strictness are required in calling a directors’ meeting. The decisions are quite uniform, however, in holding that as to all special meetings of the board of directors notice must be given. The law is inclined to tolerate more freedom in the notice and the calling and holding of directors’ meetings, inasmuch as the meetings are more frequent, the absences more common, the acts less fundamental, and ratification by acting on the contracts more certain and easy. The general rule may be said to be that where the meeting is a stated one, the time and place of which are fixed by some by-law, or regulation, no notice is necessary, unless required by statute.”

The question, therefore, which we must decide is whether the board of directors of this company holding over, after the failure to elect a new board at the annual meeting, had power to elect new officers, and specifically, power to supplant the relator by electing the defendant to the office of president and treasurer.

Section 3 of the code of regulations of the company contains a provision as follows:

“Officers and directors shall be elected for one year, unless elected at a meeting succeeding the annual meeting, and in that event such officer shall serve out the unexpired term. All officers duly elected shall serve until their successors are duly elected and qualified.”

By this provision the regular term of office of the officers of the corporation is fixed at one year, and ends with the annual

meeting of the board of directors. This is in harmony with General Code, Section 8664, which contemplates an annual election of officers.

By virtue of said Section 8664, and the provision of the regulations above quoted, if a new board had been elected at the annual stockholders' meeting, it would have been the right and duty of its members, as soon after taking their oaths of office as convenient, to select a president and other officers. The stockholders having failed to elect a new board of directors, the old directors, by virtue of General Code, Section 8647, continued in office. They continued in office for all the purposes for which a new board might have been elected. Their power and duties were the same as the powers and duties of a new board would have been. The term of office of the president and treasurer being fixed at one year, and that year having expired, the board of directors, although composed of members holding over on account of the failure to elect new members, had power to select a new president and treasurer. If the board had not acted, the old officers would have continued to hold office at the pleasure of the board until the election of a new board, and action taken by it.

It is urged, however, that the language of said Section 8664, which directs the directors "chosen at any election" as soon after taking an oath of office as is convenient, to select one of their number to be president thereof, and unless the regulations otherwise provide, also to appoint a secretary and treasurer of the corporation, impliedly restricts the right to elect the officers mentioned, to a newly elected board.

We do not think that this is the effect of the section under consideration. It does not operate to deprive the board holding over of the right to elect new officers when their term of office expires, but in our opinion the officers so elected will hold their offices subject to the right of any new board that may at any time be legally chosen to act under said section in the election of new officers. The old board will be served by officers of its own choosing, and if a new board is elected, it will have the power to act under this section and elect officers of its own choice.

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The conclusion we have reached, therefore, is that the election of the defendant was within the power of the hold-over board, and that this power was exercised in a regular and valid manner. This result arrived at from a consideration of the statutes and the code of regulations of the corporation, is supported by the only authority cited to us bearing directly on the main question involved in this action, the case of *State, ex rel, v. Guerton*, 106 Minn., 248, the first and second paragraphs of the syllabus of which are as follows:

“The articles of a corporation provided that a board of directors should serve for one year, and until their successors were elected and qualified, and that the officers of the corporation should be chosen by the directors at their first meeting after their appointment or election, and hold office for one year, or until their successors are elected and qualified.

“*Held*: The stockholders having failed to elect a board of directors at the annual meeting, the hold-over directors were authorized, at a meeting called for that purpose, subsequent to the annual meeting, to elect new officers as the successors of those holding over.”

The petition will be dismissed.

ASSESSMENT OF EXPENSE OF LAYING WATER MAINS.

Circuit Court of Cuyahoga County.

FRANK F. STRANAHAN V. J. P. MADIGAN, AS TREASURER.

Decided, May 8, 1911.

Constitutional Law—Assessing Cost of Water Pipes Upon Abutting Property.

Section 3812, General Code, which provides that municipal corporations may assess upon the abutting lots any part of the entire cost and expense connected with the improvement of any street by constructing water mains or laying water pipe, is constitutional.

A. R. Odell, for plaintiff.

E. G. Guthrey, contra.

WINCH, J.; HENRY, J., and JONES, J. (sitting in place of Marvin, J.), concur.

This action was heard on appeal. The plaintiff seeks to enjoin the collection of certain assessments upon his property in the village of Lakewood levied to pay for the laying of water mains in the street upon which said property abuts.

The case was heard upon an agreed statement of facts, from which it appears that the water mains in question were of the usual and ordinary construction, and were laid for the purpose of furnishing water to the abutting property owners and had the usual hydrants for municipal fire protection.

It was also admitted on the hearing that plaintiff's lands were specially benefitted by the improvement and no question was made that the assessment was excessive.

The sole question submitted to the court is whether the municipality has power to levy assessments upon abutting property to pay for water mains laid in the street for the purpose of supplying abutting property with water. Plaintiff claims that the cost of extending water mains should be borne by the municipality from the city's general fund.

That plaintiff's contention would have been sustained before the amendment of Section 50 of the Municipal Code, April 14, 1904 (97 O. L., 98), now found as Section 3812, General Code, may be conceded, for the general policy of the state theretofore was to require municipalities to pay for the extensions of their water works systems out of the revenues of the same, or by the issue of bonds.

But on the date and by the amendment mentioned the Legislature provided that the council of any municipal corporation may assess upon the abutting lots in the corporation any part of the entire cost and expense connected with the improvement of any street by constructing water mains or laying water pipe.

This, we think, was within the power of the Legislature to provide, though a decided change from the general policy with regard to the payment of the cost of laying water pipes theretofore prevailing.

The petition is dismissed.

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**DEFENSES WHICH MAY BE RAISED AGAINST A
COUNTER-CLAIM.**

Circuit Court of Cuyahoga County.

GEORGE A. WILLIAMS v. LEO EDERER.

Decided, May 8, 1911.

Counter-Claim—Objection to, How Raised.

1. In an action on an account for goods sold and delivered, the defendant can not set up as a counter-claim, a cause of action in tort, growing out of the sending of a letter by plaintiff's attorney to defendant's employer, whereby the defendant lost his job.
2. Objection to such a counter-claim may be taken at the trial, by objection to the introduction of any evidence under the counter-claim, even though no demurrer was filed to it and an answer was filed.

Weed, Miller & Rothenberg, for plaintiff in error.*Howland, Moffett & Niman*, contra.

WINCH, J.; HENRY, J., and JONES, J. (sitting in place of Marvin, J.), concur.

Lederer sued Williams on an account for goods sold and delivered. Williams filed an answer and cross-petition, and Lederer then filed a reply. The case was tried to a jury, with verdict and judgment for Lederer.

In this court the main contention of Williams is with regard to the charge and certain requests to charge, all as bearing upon the first cause of action set up in his cross-petition. That cause of action was for a tort growing out of the sending of a letter by Lederer's duly authorized attorney to Williams' employer, whereby he lost his job.

There was no prejudicial error in the charge if this counter-claim was not properly before the court.

It is not every cause of action which a defendant claims against the plaintiff that may be set up by him as a counter-claim. While Section 11315, General Code, says that the defendant

may set forth in his answer as many grounds of counter-claim as he may have, Section 11317, General Code, defines a counter-claim as "a cause of action existing in favor of a defendant against a plaintiff or another defendant or both, between whom a several judgment might be had in the action, and arising out of the contract or transaction set forth in the petition as the foundation of the plaintiff's claim, or connected with the subject of the action."

Manifestly the sending of the letter to Williams' employer a long time after he had purchased the goods, had nothing to do with the purchase of the goods, nor was it connected with the subject of the action, which was on an account due from Williams to Lederer.

Indeed, the learned counsel for plaintiff in error does not seriously contend that the cross-petition pleads a counter-claim proper to be set up in this action, but, he says, objection thereto should have been taken by demurrer and was waived by filing a reply containing an answer to said counter-claim.

That demurrer would lie to this counter-claim appears from Sections 11323 and 11324, General Code. Among other grounds for demurrer to a counter-claim these sections mention: that on its face it is insufficient in law; that the facts stated do not constitute a counter-claim, and that the counter-claim does not state facts which entitle the defendant to the relief granted.

There is a provision of law (Section 11311, General Code) to the effect that if a *defendant* does not raise an objection to a *petition* by demurrer, the ground of the objection appearing on the face of it, he shall be deemed to have waived it, except only that the court has no jurisdiction of the subject of the action and that the petition does not state facts which show a cause of action.

There is no such provision with regard to a plaintiff's failure to demur to a counter-claim and we see no reason why any application of the rule governing failure to demur to a petition should be made to a failure to demur to a counter-claim. Other provisions of law take care of the latter case and the statutes are so specific on the subject of demurrers, that no effort should be

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made to extend them by implication to take in cases not thus specifically provided for.

There is no question that had *no* objection been raised by the plaintiff to the trial of the counter-claim in the same action with his claim on the account, though it would be an improper intermingling of two separate and independent suits in one action, still a reviewing court would not reverse a judgment thus obtained by the parties' acquiescence.

But the plaintiff objected in time to the introduction of *any* evidence under the counter-claim. We think that he thereby saved his rights. The practice of answering over and objecting to the introduction of any evidence under a petition, on the ground that it does not state facts which show a cause of action, is common and approved, and we think the statutes regulating demurrer to a counter-claim authorize the same practice.

There are authorities strictly in point on this subject cited by counsel for defendant in error. *McDougall v. McGuire*, 35 Cal., 374, and *Smith v. Hall*, 67 N. Y., 48.

We have examined the statutes of both of said states and find them almost identical with the statutes of this state on the same subject.

It is urged that by holding as indicated an injustice is done plaintiff in error in that the finding against him in this action on his counter-claim may be pleaded against him as *res adjudicata* should he hereafter desire to sue upon the cause of action stated in said counter-claim.

We express no opinion upon this subject, but call attention to the privilege accorded a party in such situation by Section 11337, General Code, which Williams might have taken advantage of.

The only other error complained of is a ruling on evidence.

We think it was perfectly proper for Williams to meet the point sought to be made by Lederer that the former had done nothing whatever to arrange for settlement of the latter's claim. This he was permitted to do by showing that he turned the matter over to his attorney, and that his attorney wrote a letter to Lederer's attorney. The letter itself, however, was inadmissible, being of a self-serving nature.

Judgment affirmed.

FINDING AS TO THE DOMICILE OF A TESTATOR.

Circuit Court of Summit County.

HOMER A. HINE v. MARTHA L. COWLES ET AL.*

Decided, April 12, 1911.

Wills—Domicile of Testator—Judgment of Probate Court Conclusive.

The judgment of a probate court of this state as to the domicile of a testator whose will is probated in said court is conclusive upon the courts of this state, though not binding upon the courts of other states.

Allen, Waters, Young & Andress, for plaintiff in error.*Carpenter, Young & Stocker*, contra.

WINCH, J.; HENRY, J., and MARVIN, J., concur.

Welthia Daniels died in California on November 20, 1906, leaving a will which she had executed in Summit county, Ohio, where she formerly lived, appointing the plaintiff executor thereof. Said will was duly probated in this county in January, 1907, and thereafter an authenticated copy was admitted to record in Los Angeles county, California, and an ancillary administrator, with the will annexed, was there appointed to administer assets of the estate there found.

Thereafter a petition was filed in the Superior Court of Los Angeles County, California, to contest the validity of said will, and it was there set aside on account of the testator's alleged incapacity to make it.

Later on, in 1910, a petition was filed in the Common Pleas Court of Summit County, Ohio, by Hine, the executor here appointed, asking for the direction of the court as to his duties under the will. It is conceded that all necessary and proper parties were brought before the court in said action, which is the one now before us on appeal.

*Affirmed without opinion, *Cowles et al v. Cowles et al*, 86 Ohio State, 350.

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The question really raised by the pleadings is whether the record of the Probate Court of Summit County, admitting the said will to probate, is conclusive as to the fact that the testator was domiciled in this county at the time of her decease, or whether evidence should be received on that subject tending to show that she was a resident of California when she died.

In this connection, some of the defendants urge that under the Federal Constitution full faith and credit are to be given to the judgment of the Superior Court of Los Angeles County, California, setting aside the will, and that by said judgment the executor, Hine, is without authority to act under the said will.

We have here a familiar and interesting example of the conflict of laws.

That this court is bound by the finding of the probate court of this county, that Welthia Daniels was a resident of Summit county when she died, there seems to be no doubt.

That court is a court of record and of ample jurisdiction to hear and determine all facts upon which its jurisdiction rests. It was necessary for that court to determine whether the testator was a resident of this county when she died. It heard and determined that fact, and found that she was such resident. No effort has ever been made to review said finding, though ample provision has been made therefor by statute. See General Code, Sections 10520, 10521. Woerner on the American Law of Administration, on page 328, says of probate courts:

“If it is found that the tribunal is one competent to decide whether the facts in any given matter confer jurisdiction, it follows with inexorable necessity that, if it decides that it has jurisdiction, then its judgments within the scope of the subject-matters over which its authority extends, in proceedings following the lawful allegation of circumstances requiring the exercise of its power, are conclusive against all the world, unless reviewed on appeal, or avoided for error or fraud in a direct proceeding. It matters not how erroneous the judgment; being *a judgment*, it is the *law*, of that case, pronounced by a tribunal created for that purpose.”

This statement of the law is perhaps too strong, if intended that the judgment has extra-territorial effect, but is correct as to

the effect of the finding upon the courts of the state in which, and according to the laws of which, it was made.

On this subject, *Wharton on the Conflict of Laws*, 3d Edition, Section 645, says:

“The law, as originally settled in Massachusetts, was that if an administrator or guardian was appointed by a judge of probate, who had no jurisdiction through the want of domicil on the part of the deceased, the whole proceedings were void, and all titles passing under the same null. To correct this, and to give stability to the law, statutes were passed in Massachusetts and Maine, and other states, limiting the time of appeal from probate decisions. Under these statutes, it was held by the Superior Court of Maine, in 1870, that when administration was commenced in Maine on the assumption that the deceased was domiciled in that state, and there was a final decree of the probate court on the settlement of the fourth account, after due proof, based on this assumption, then the question of domicil must be regarded as conclusively settled, and so far as concerns distribution of Maine assets, and that it was not competent to show that the last domicil was in another state. But such statutes can not operate extra-territorially so as to invest internationally with domicil a person not domiciled in the enacting state.”

In the light of the law thus stated, we find nothing in the cases of *Overby v. Gordon*, 177 U. S., 214, and *Tilt v. Kelsey*, 207 U. S., 42, cited by counsel for defendants, requiring this court to give greater credit to the decisions of a court of another state than it does to the decisions of a competent court of this state. Furthermore, the judgment of this court, here sought, is to act upon the *res*, as expressed in the last mentioned case. It is to act upon funds in the hands of the executor and within the jurisdiction of the Probate Court of Summit County, and of this court. To that extent, the finding as to domicil made by the probate court of this county, is conclusive, though the authorities cited show that said finding would not be binding upon the courts of California.

It will be noticed that said cases, as others which have been examined, hold that the adjudication of domicil by the courts of one state have no binding force upon the courts of other states, and their effect must be so limited.

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The case of *Willett's Appeal*, 50 Conn., 330, is not reconcilable with the federal cases cited and, had it been followed in California, would have led to a contrary conclusion in the court there.

Objections to the introduction of evidence as to domicile are sustained.

Our conclusions are, that the executor proceed as directed by the will; for the reasons stated, however, because the finding of the probate court here will not be binding upon the courts of California, as to the domicile of Mrs. Daniels, we can not direct him to incur any expense in litigation there.

Decree, see journal.

**DISCRETION IN PERMITTING A GRADE CROSSING TO BE
CONSTRUCTED.**

Circuit Court of Cuyahoga County.

THE NEW YORK, CHICAGO & ST. LOUIS RAILWAY COMPANY V.
THE VILLAGE OF LAKEWOOD.

Decided, May 15, 1911.

Railroad Crossing Act—Grade Crossing Permitted—Discretion of Judge.

A judgment of the common pleas permitting a village to construct a crossing at grade over a railroad, will not be set aside, unless it appears that the trial judge has clearly abused his discretion in so ordering.

John H. Clark, for plaintiff in error.

Alfred Clum, contra.

WINCH, J.; HENRY, J., and MARVIN, J., concur.

This is a proceeding to review the judgment of the common pleas court, permitting the village to construct a crossing at grade over the railroad at Manor Park avenue in said village.

This court is committed to the general policy of refusing permission for crossings at grade, and had the matter been brought before this court for its original judgment in the matter, it is

likely a crossing at grade would not have been permitted at the point mentioned.

The law, however, vests the trial judge with considerable discretion. The evidence before us does not show an abuse of such discretion.

The village made proof of such matters as the statute requires, and the fact that there are twenty-six existing crossings at grade over this railroad within the village may well have inclined the trial judge to conclude that the best way to have all of such crossings abolished, was to put the burden of another one upon the railroad. We do not know such would be the tendency; the whole subject is purely speculative; for that reason we are not disposed to say that the trial judge was clearly wrong in his conclusion.

Judgment affirmed.

APPEAL CONSTRUED AS ENTERING AN APPEARANCE.

Circuit Court of Cuyahoga County.

STRONG, COBB & COMPANY V. MAIER JAFFA.*

Decided, May 15, 1911.

Suit Against Partnership in Firm Name—Appeal—Change of Style on Appeal—Judgment Valid.

A partnership being sued in its firm name before a justice of the peace and judgment there being rendered against it, appealed the case to the common pleas court, where the case was properly docketed as against the partnership, but the plaintiff filed a petition therein entitling the case as one against certain individuals doing business under said firm name, but no service was had thereon. Afterwards default judgment was rendered against the partnership in its firm name. Upon motion to set aside said judgment for want of service on the individuals and because they did not compose the firm, *Held*: The appeal by the firm entered its appearance in the common pleas court and the judgment against it is valid.

*Affirmed without opinion, *Strong, Cobb & Co. v. Jaffa*, 87 Ohio State, 504.

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T. H. Bushnell, for plaintiff in error.

W. T. Clark, contra.

WINCH, J.; HENRY, J., and MARVIN, J., concur.

Maier Jaffa sued Strong, Cobb & Company, by its firm name, in a justice court, and recovered judgment. The firm appealed the case to the common pleas court, and in due time Jaffa filed a petition therein, entitling it: "Maier Jaffa, plaintiff, v. S. M. Strong, L. A. Cobb, R. L. Cobb and E. L. Strong, partners doing business under the firm name and style of Strong, Cobb & Company, defendants." The case, however, was properly docketed in said court, as it had been entitled in the justice court.

No effort was ever made to procure service upon the individuals named as partners, nor did they or the firm file any answer to said petition. In due course of time, default judgment was rendered against the firm, and the firm has filed petition in error in this court to reverse said judgment, assigning as error that the individuals named in the petition as members of the firm were never served, nor did they compose the firm of Strong, Cobb & Company.

We do not see what difference this makes to the validity of the judgment against the firm. It had been sued by its firm name before the justice of the peace, and in that name appealed its case to the common pleas court. By the appeal, it duly entered its appearance in said court, and of the petition filed therein it was bound to take notice without further service.

The caption of the petition contained some surplus words, but it stated a cause of action against the firm, and judgment was rendered against it. Why the firm should now complain, we fail to see. Of course the members of the partnership are not parties to the judgment; they can be made such only by action, as provided in Section 11651, General Code.

Judgment affirmed.

**BUYER BOUND BY APPLICATION OF PAYMENTS MADE
BY THE SELLER.**

Circuit Court of Cuyahoga County.

EVAN H. HOPKINS, RECEIVER OF THE CAREY CONSTRUCTION CO.,
AND THE HUNKIN-CONKEY CONSTRUCTION CO. v. THE
CLEVELAND & PITTSBURG COAL CO.

Decided, May 15, 1911.

Application of Payments—Entire Contract—Material Shipped to Different Jobs.

Upon a single contract for 10,000 barrels of cement to be delivered at one place, by direction of the buyer shipments of part was made to different places where it went into buildings and for which, by reason of the failure of the buyer, the seller was obliged to file mechanic's liens, whereupon it applied previous payments on the entire contract in its discretion, upon the several liens, having no direction from the buyer as to the application of payments. In an action against one who had assumed one of the contracts where the buyer had used cement for which a lien had been filed, *Held*: It was bound by the application of payments made by the seller.

Thompson & Hine, for plaintiff in error.

Lang, Cassidy & Copeland, contra.

WINCH, J.; HENRY, J., and MARVIN, J., concur.

This was an agreed case, submitted without action, pursuant to the statute.

It seems that the Cleveland & Pittsburgh Coal Company sold 10,000 barrels of cement to the Carey Construction Company, price stipulated being \$1.30 per barrel, f.o.b. Cleveland. It shipped the cement to various places, in Cleveland and Detroit, as directed by the construction company, where the latter company had building contracts.

Among other shipments was one of 2,400 barrels to Detroit, on which the construction company paid the freight, amounting to \$759.05, and forwarded the receipted bills to the coal company, which agreed to a credit of \$547.20, being the freight paid from point of shipment to Cleveland, which it had agreed to pay.

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The cement shipped to Detroit was used in the construction of the Fairview Pumping Station job, so-called, which the Carey Construction Company was engaged in building. That company failed, a receiver was appointed, and he, under the authority of court, sold to the Hunkin-Conkey Construction Company all right, title and interest in said contract, and the latter company assumed and agreed to pay all bills for material in connection with said work.

The Hunkin Company claims that said sum of \$547.10 overpaid on the freight of said 2,400 barrels of cement shipped to Detroit, should be credited as payment on said 2,400 barrels account. The coal company says it has applied said sum on cement furnished the so-called "Yates" job in Cleveland. The court found with the coal company.

We think this conclusion correct. Here was one account for 10,000 barrels of cement. Various items were charged as shipments were made; credits of payments were made by the coal company on the account generally, until, after failure of the Carey Company, it became necessary to file attested accounts against various jobs where the cement had been used, and the coal company elected to credit this \$547.20 on the "Yates" job.

This it had a right to do, in the absence of previous directions from the Carey Company as to the application of said credit. The Carey Company never gave any direction with regard thereto, and we see nothing in the circumstances of the case obviating the necessity for such direction.

Judgment affirmed.

POLICY OF THE LAW AS TO MEASURES.

Circuit Court of Cuyahoga County.

STATE OF OHIO, EX REL JOHN BUCH, v. CHARLES J. BURNS, AS
SEALER OF WEIGHTS AND MEASURES OF THE
CITY OF CLEVELAND.

Decided, May 15, 1911.

*Sealer of Weights and Measures—Standard Half Bushel—Rectangular
Boxes Not Sealable.*

The city sealer can not be required to seal rectangular wooden boxes
having exactly twice the cubic contents of the standard half
bushel.

*Lang, Cassidy & Copeland and Geo. O. Willett, for plaintiff in
error.*

N. D. Baker, contra.

WINCH, J.; HENRY, J., and MARVIN, J., concur.

The relator asks that the city sealer be required to seal cer-
tain rectangular wooden boxes, each 20 3-4 inches long, 13 inches
wide, a fraction less than 8 inches deep, and containing 2150.42
cubic inches, which he alleges have exactly twice the capacity of
the standard half bushel.

He says that he is using these boxes as receptacles in which to
expose and offer for sale garden products, such as potatoes and
onions, which are usually sold by heaped measure.

The bushel does not appear to be recognized as a unit or stan-
dard of measure in this state. Section 6414, General Code,
provides that "the unit or standard measure of capacity for
substances other than liquids, from which all other measures of
such substances shall be derived and ascertained, shall be the
standard half bushel measure, furnished this state by the govern-
ment of the United States, the interior diameter of which is
thirteen inches and thirty-nine fortieths of an inch, and the
depth is seven inches and one twenty-fourth of an inch."

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General Code, Section 6415. "The peck, half peck, quarter peck, quart and pint measures shall be derived from the half bushel measure by dividing it and each succeeding measure by two."

General Code, Section 6416. "Articles usually sold by heaped measure shall be heaped in a conical form as high as such articles permit."

General Code, Sections 7965 to 7968 inclusive, provide that the professor of physics in the state university shall be, *ex officio*, state sealer; that standards of weights and measures adopted by the state shall be deposited in a suitable room at the university; that copies of the original standards shall be procured by the state sealer for the use of each county in the state, and be delivered to the auditor thereof, as follows:

"One-half bushel measure, of one-eighth inch copper, with brass rim; one gallon measure, of one-sixteenth inch copper, with brass rim and handle; one-half gallon, one quart, one pint, and one-half pint measures, to be made in the same manner and of the same material. The state sealer shall furnish like copies of the original standards to the sealer of any city or village upon application therefor."

General Code, Sections 4318 to 4322 inclusive, provide for the appointment of a sealer of weights and measures in cities and villages, and his duties.

General Code, Section 4322, reads:

"The sealer of weights and measures shall compare all weights and measures brought to him for that purpose with the copies in his possession, and when such weights and measures are made exactly to agree with such copies, he shall seal and mark them."

General Code, Sections 3616 and 3651, provide that municipal corporations shall have power

"To regulate the weighing and measuring of hay, wood and coal, and other articles exposed for sale, and to provide for the seizure, forfeiture, and destruction of weights and measures, implements and appliances for measuring and weighing, which are imperfect or liable to indicate false or inaccurate weight or measure, or which do not conform to the standards established by law, and which are known, used, or kept to be used for weighing or

measuring articles to be purchased, sold or offered or exposed for sale.”

The petition sets forth certain sections of the ordinances of the city of Cleveland, to-wit, 1415 to 1421 inclusive, which relate to weights and measures, but we find no specific direction therein that the city sealer shall provide any standard for a bushel. On the contrary, the standards adopted by the state of Ohio are made the test by which all weights and measures shall be compared and determined.

There are some provisions of these ordinances making it unlawful for any person to expose for sale any commodity, article or articles which are commonly sold by measure, in any measure or utensil or receptacle, which is not tested, marked and sealed. Whether this ordinance is valid in so far as it requires receptacles not used as measures to be sealed need not be decided. While this question is squarely raised by demurrer to the petition, yet, as it appears clearly from the petition that the boxes described, when heaped up, do not measure as much as two heaped-up circular half bushels, of the standard prescribed by law, the relief prayed is denied on that ground alone.

A rectangular box can not be heaped in a conical form, as required by law, and if heaped at all, will not produce the result of a circular measure that is heaped.

It may also be suggested that the law seems to require that all measures be of circular form, instead of square or rectangular, and it is demonstrable that more articles of some size, as potatoes, will go into a round receptacle than into a square one of the same cubic contents. This is so because of the loss of space at the four corners.

This decision is not based upon the proposition that the city sealer can not be required to seal any measure of capacity greater than one-half bushel, though, speaking for myself alone, I am satisfied that such is the law, as I am that the ordinance is invalid in so far as it makes it unlawful to expose any commodity for sale in a receptacle which is not sealed, provided said receptacle is not used as a measure.

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It would appear to be the policy of the law that measures should be of fixed shape and of limited capacity to the end that the people may become familiar with them, and able to detect false measures at a glance.

The demurrer to the petition is sustained and relator not desiring to plead further, the petition is dismissed.

ADMINISTRATOR REQUIRED TO SHOW AUTHORITY TO SELL.

Circuit Court of Summit County.

W. Y. HUMPHRIES ET AL V. H. E. LOOMIS ET AL.

Decided, April 12, 1911.

Sale of Stock by Administrator—Buyer May Require Proof that Seller is Administrator and Has Order to Sell.

One who has agreed to buy stock belonging to an estate has a right to refuse to accept it until he is furnished proof that the person agreeing to sell it is administrator of the estate and has obtained an order of the proper court fixing the price at which the sale may be made.

Slabaugh, Seiberling & Huber and John P. Hunter, for plaintiffs in error.

Voris, Vaughn & Voris, Rogers & Rowley and C. C. Benner, contra.

• WINCH, J.; HENRY, J., and MARVIN, J., concur.

This was an action for the purchase price of 10,000 shares of the capital stock of the Powell Coal & Coke Co. at an agreed price of \$100,000 which plaintiffs claimed to have sold and delivered to the defendants under a certain contract with them.

In the common pleas court a verdict for the defendants was directed at the close of the plaintiff's evidence.

Very interesting propositions of law have been argued in this court regarding the proper legal effect to be given to said contract, but, for the first time in this court we are told, objection

to the validity of said contract is based upon a lack of valid signatures thereto on the part of the plaintiffs.

If this point is well taken, a verdict for the defendants was properly directed, and it is unnecessary to determine other matters.

Among other signatures to the contract appears the following: "Estate of Richard M. Jennings, Evan D. Jennings, administrator, 449 shares."

The answer of the defendants admits that they signed the alleged contract, but says that it "was never delivered either by said plaintiffs or said defendants, and never at any time became of any validity, or gave rise to any liability whatsoever on the part of said defendants or either of them." It further alleges that "said plaintiffs did not execute and deliver said instrument in writing to said defendants on or before October 15th, 1907 (the day set for the completion of the negotiations), but on the contrary, never did execute and deliver same."

Proof was made that 449 shares of said stock stood in the name of Richard M. Jennings, but no proof was offered that Evan D. Jennings was administrator of his estate, or that he had any order of the proper court of Pennsylvania authorizing or directing him to sell it or to enter into a contract for the sale thereof.

No evidence was offered as to the laws of Pennsylvania governing administrators in the sale of shares of stock belonging to the estates of deceased persons, so we must assume that its laws on the subject are the same as the laws of Ohio. Section 10704. General Code, provides:

"The executor or administrator may sell either at public or private sale, railroad stock or other stock or shares in a corporation, but if he sells at private sale, it must be for a sum not less than for that purpose is fixed by an order of the probate court."

Such being the law, it seems that one buying stock belonging to an estate has a right to demand proof that the person offering to sell such stock is administrator of the estate, and has an order of the proper court fixing the price at which the sale may be made.

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No proof of these facts having been presented to the defendants, they had a right to refuse to go on with the contract, and no evidence being adduced on the subject at the trial, the court properly held that the defendants were not bound by the contract, for their agreement was for all the stock and the Jennings stock was never so offered to them as to bind the Jennings estate.

The case of *Hicks v. Hicks*, 11 W. L. B., 72, cited by counsel for plaintiffs in error, is not in point. There Judge Blandin held that an executed sale of stock made by an administrator without an order from the probate court, but afterwards reported to the court in the administrator's account, which was approved by the court, would not be set aside, the purchaser having paid full value for the stock, and there being no fraud alleged.

But here we have a contract which the court is asked to enforce, notwithstanding the administrator had not complied with the plain direction of the law. Relief to him, under such circumstances, should be denied; the purchaser has asked no more than he had a right to ask, and the administrator has neglected his plain duty.

For the reasons stated, because it seems to be decisive of the case, and without consideration of the other important legal propositions so ably argued by counsel, the judgment of the common pleas court is affirmed.

VALIDITY OF THE LAW RELATING TO SEINES AND FISH TRAPS.

Circuit Court of Summit County.

WILLIAM WINKLEMAN V. STATE OF OHIO.

Decided, April 12, 1911.

Constitutionality of Fish Law.

Section 1426, General Code, making it an offense to have in possession a fish trap in the inland fishing district of the state, when considered in connection with subsequent sections making exceptions thereto, is constitutional.

Voris, Vaughn & Voris, for plaintiff in error.

Warren Thomas and F. J. Rockwell, contra.

WINCH, J.; HENRY, J., and MARVIN, J., concur.

Plaintiff in error was tried before a justice of the peace, and found guilty of "having in his possession three certain devices for catching fish, to-wit, three fish traps, contrary to the statute in such case made and provided." He was fined twenty-five dollars.

Upon error to the common pleas court, the judgment of the justice was affirmed, and this proceeding is brought for the purpose of reviewing said judgment.

It is claimed that the evidence did not warrant a conviction: that while Winkleman had made the trap nets, and had them in his possession, his possession of them was perfectly innocent, as he did not intend to use them unless, upon legal advice which he was awaiting, it was found that he had a right to use them in a stream which ran through his father's farm.

This claim is rather fishy; one of the traps had been used; the justice was warranted in his conclusion as to the purpose the young man intended them for, if any offense was charged in the affidavit.

This brings us to the main contention in the case:

It is claimed that the mere possession of fish traps is not sufficient to constitute an offense; that the state must allege and prove

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an intention on the part of the accused to use the traps for an unlawful purpose. It is said that any other construction of the statute would make it unconstitutional, contravening Article I, Section 1 of the Bill of Rights, which guarantees the right to possess, enjoy and protect property.

We do not so view the statutes on this subject. Section 1426, General Code, provides that no person shall have in possession a fish trap in the inland fishing district of this state. Summit county is within said district.

Section 1456 provides that it is not unlawful to take fish in any manner in the ponds or lagoons formed by the receding waters of any river, when such ponds and lagoons no longer have any connection with the channels of such streams. nor in private artificial fish ponds or privately owned lakes.

Section 1457 provides that it is not unlawful for the owner of a private artificial fish pond to have traps in his possession for use therein, and that it is not unlawful to have in possession fish traps to be used in catching fish in the Ohio river, Lake Erie and certain of its bays, when the traps are kept within one mile of said waters.

Section 1458 says that it is not unlawful for manufacturers or dealers to have fish traps in their possession, when kept in their regular places of business, or for common carriers to have them in their possession for transportation.

Section 1461 provides, that the finding of a trap had in possession in violation of law shall be *prima facie* evidence of the guilt of the person owning, using or claiming such property.

We think these exceptions are ample and reasonable so that the law on this subject is entirely within the Constitution.

Nor was it necessary that the affidavit contain negative averments as to the many exceptions enumerated. *Becker v. State*, 8 O. S., 391; *Billingheimer v. State*, 32 O. S., 435; *State v. Hutchinson*, 55 O. S., 573; *Hale v. State*, 58 O. S., 676.

The accused made no effort to bring himself within any of said exceptions; indeed, as first stated, the evidence showed that his possession of the traps was not an innocent possession, and warranted his conviction.

Judgment affirmed.

RIGHT TO EQUITABLE SET-OFF.

Circuit Court of Cuyahoga County.

THE MASSACHUSETTS BONDING & LIFE INSURANCE COMPANY V.
CORNELIUS A. FISH ET AL.

Decided, June 2, 1911.

Equitable Set-off—Note Held by Bank Assigned to Another After Maturity—Deposits in Bank Set-off Against Same.

Where husband and wife are jointly indebted to a bank upon a promissory note and one of them deposits money to his own credit in the bank and it, after maturity of the note, assigns the same to another, of which assignment the makers of the note have no notice, and one of them continues to make deposits in the bank which later becomes insolvent, upon suit being brought upon the note, the deposits made in the bank both before and after the assignment of the note may be set off against the amount due thereon.

Brady, Dowling & Hole, for plaintiff in error.

White, Johnson & Cannon, contra.

WINCH, J.; HENRY, J., and MARVIN, J., concur.

The judgment in this case must be affirmed.

“The holder of a promissory note, who took it after maturity, holds it subject to every objection, including equitable set off, to which it was subject in the hands of his assignor.” *Baker v. Kinney*, 41 O. S., 403.

“In equity there are many exceptions to the technical rule that joint and separate debts can not be set off against each other, and insolvency is a sufficient ground for such exception.” 12 *Michie Digest*, 328, and cases cited.

The insolvency of the bank was sufficiently shown by proof of its assignment for the benefit of its creditors.

The full amount of the deposit was properly set off against the note, including that part deposited after the transfer of the note to the bonding company, but before notice thereof to the makers.

In *Follett v. Buyer*, 4 O. S., 586, 591, it is said by Judge Thurman:

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“When an overdue or non-negotiable note is assigned, the assignee takes it subject to all the equities existing between the payee and the maker; and hence it is competent for the latter, notwithstanding the assignment, to show that it was obtained by fraud, or without consideration, or that before he received notice of the assignment it had been paid or otherwise discharged. So, too, he may set off any liquidated demands which he held against the payee when he first obtained information of the assignment,” etc.

No prejudice resulted from erroneous rulings on evidence called to our attention; they all related to the claim that Fish was principal and his wife surety on the note. The right to equitable set off in this case grows out of the insolvency of the bank and not the relation of principal and surety on the note. Evidence erroneously admitted on the latter point would have no prejudicial effect upon the case; there was enough competent evidence to warrant the judgment without it.

Judgment affirmed.

**NOTE NEGOTIATED AFTER CONSIDERATION THEREFOR
HAD FAILED.**

Circuit Court of Cuyahoga County.

HELENA KUCHENBACHER ET AL V. MATILDA A. GILL.

Decided, June 2, 1911.

*Promissory Note—Failure of Consideration—Notice to Holder of Note
—Burden of Proof*

In an action upon a promissory note by an endorsee thereof, when it is shown that consideration for the note has failed, the burden is then upon the plaintiff to show that she had no notice of such failure of consideration at the time she became the holder of the note.

L. R. Katz, George Welch and Richard Inglis. for plaintiff in error.

Fred Desberg, contra.

WINCH, J.; HENRY, J., and MARVIN, J., concur.

Plaintiffs in error were defendants below. The action was on a promissory note, made since the enactment of the negotiable instrument code, and transferred to the plaintiff, who claimed to be a holder thereof in due course.

The defense was failure of consideration, the note having been given in payment for the erection of a house which the payee agreed to erect, but never completed. Evidence was introduced tending to establish the defendants' claim of failure of consideration, and the plaintiff had notice thereof, when she received the note.

On the burden of proof, the court charged the jury that the burden was upon the *defendants* to show not only failure of consideration, but notice thereof to the holder.

Counsel for plaintiffs in error admit that the burden was on them to show failure of consideration, but urge that the burden was with the holder of the note to show that she had no notice thereof.

The question seems settled by Sections 8164, 8160, 8157 and 8161 of the General Code, parts of which, germane to the inquiry in hand, read as follows:

"Section 8164. Every holder is deemed *prima facie* to be a holder in due course, but when it is shown that the title of any person who negotiated the instrument was defective, the burden is on the holder to prove that he or some person under whom he claims, acquired the title as a holder in due course."

Section 8160. "The title of a person who negotiates an instrument is defective when he negotiates it in breach of faith, or under such circumstances as amount to a fraud."

Here the defendants gave evidence tending to show that the payee negotiated the note after the consideration thereof had failed; this was bad faith and amounted to a fraud on the part of the payee, and so his title was defective under Section 8186 and put the burden upon the holder under Section 8164, to prove that he acquired the title as a holder in due course.

Section 8157 says that "one is a holder in due course under the following conditions: * * * 4. That at the time it was negotiated to him he had no notice of any infirmity in the instrument or defect in the title of the person negotiating it."

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Section 8161. "To constitute notice of any infirmity in the instrument, or defect in the title of the person negotiating it, the person to whom it is negotiated must have had actual knowledge of such facts, that his action in taking the instrument amounted to bad faith."

From these four sections the conclusion seems logically to follow that if it is shown that the consideration of the note has failed, then the burden is on the holder to prove (8164) that he had no notice (8157), *i. e.*, actual knowledge (8161), that the payee of the note who negotiated it to him had negotiated it in breach of faith, or under such circumstances as amount to fraud (8160). In other words, he must show that he had no knowledge of such facts that his action in taking the instrument amounted to bad faith (8161).

Applying this conclusion to the case in hand, if it was shown that the consideration of the note had failed, then the burden was on the plaintiff to show that she had no notice of such failure of consideration at the time of her becoming the holder thereof.

For error in the charge, the judgment is reversed and cause remanded for a new trial.

**COLLECTION OF COSTS FROM COUNTY IN WORKHOUSE
CASES.**

Circuit Court of Cuyahoga County.

CHARLES P. SALEN V. STATE OF OHIO. EX REL, ETC.

Decided, June 2, 1911.

***County Commissioners—Contract for Care of Prisoners in Workhouse—
Such Prisoners Pay their Fines by their Labor—Receipt Thereof
by County Treasurer—Clerk's Fees.***

1. The county commissioners may contract for the care of persons convicted of misdemeanors, in a workhouse of a municipality within the county.
2. The provision in Section 4151, General Code, for sentencing a prisoner to the workhouse "until he be discharged at the rate of sixty cents per day for each day of confinement," means that the prisoner pays his fine, at the rate of sixty cents a day, by his labor.
3. Where it appears that the amount to be paid by the county for the care of prisoners in the city workhouse is decreased by the amount realized from the work of the prisoners, the clerk of courts may collect of the county treasurer his fees in cases in which said prisoners were convicted.

***Smith, Taft & Arter*, for plaintiff in error.**

***John A. Cline and W. D. Meals*, contra.**

WINCH, J.; HENRY, J., and MARVIN, J., concur.

The prosecuting attorney of Cuyahoga county brought an action against Charles P. Salen, to recover from him certain fees alleged to have been unlawfully charged and collected by him as clerk of the courts of said county.

The clerk answered, setting up his defense, and a demurrer to his answer to the first cause of action stated in the petition was sustained. This is the only ruling in the case brought to this court for review.

Said answer to the first cause of action is as follows:

"Defendant admits that at various times while he has been county clerk he has presented to the board of county commis-

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sioners, bills for costs accruing to him as said clerk, aggregating \$1,980.43, and that these costs accrued in actions wherein the defendants were convicted of misdemeanors and were actually sentenced to the workhouse, under the control of the city of Cleveland, a municipal corporation within the limits of said county, and that in each instance the defendants were unable to pay said costs, and said defendants were confined to the workhouse until they were discharged therefrom, by reason of the provisions of the law entitling them to a credit of a per diem allowance of 60c per day; that each of said bills was allowed by the board of county commissioners, and defendant further avers that said allowance was made on the approval of the other county officers, and alleges that said allowance was in all respects in accordance with the law and made with full authority.

“Defendant further alleges that the county of Cuyahoga has no workhouse, and that it has an agreement with the city council of the city of Cleveland, and that by reason thereof the amount to be paid by the county for the care of said prisoners is decreased in the amount realized from the work of said prisoners.

“Defendant further alleges that an objection was heretofore made to the allowance of claims of this character at the time a predecessor of this defendant was in office, to-wit, one Henry W. Kitchen. That therefore said Kitchen caused to be instituted in the court of common pleas an action in mandamus against the board of county commissioners, being cause number 22269 in said court. That said cause came on to be heard before Hon. G. M. Barber, then a judge in the Court of Common Pleas of Cuyahoga County, Ohio, and in said action he expressly ordered the commissioners to pay to the relator, ‘in every case in which judgment was affirmed, the costs paid by plaintiff in error either by labor in the workhouse of the city of Cleveland, or otherwise.’ That said judgment is unreversed and still in full effect and force, and a complete determination of the first cause of action, and has been generally acquiesced in by all of the officers of Cuyahoga county having to do with the allowance of claims of this character, until the state board of examiners determined in their minds that the decision of the court heretofore made was not in accordance with the views held by said board.”

Now it is said that this answer is bad for several reasons:

First. Because the statute gives no authority to the county commissioners to make a contract for care of persons convicted of misdemeanors, in a workhouse of a municipality within the county.

The point appears to be well taken on the face of the statute, which is now General Code, Section 12384, and in fact reads as follows:

“The commissioners of a county, or the council of a municipality wherein there is no workhouse, may agree with the city council, or other authority having control of the workhouse of a city in any other county, or with the board of district workhouses, having a workhouse, upon what terms and conditions persons convicted of misdemeanors or of the violation of an ordinance of such municipality having no workhouse, may be received into such workhouse under sentence thereto.”

Of course, this result was not intended by the Legislature. Its purpose was to authorize county commissioners to contract with the authorities of workhouses within the county if any, or without the county, if none within. This seems clear from an inspection of Section 4128, General Code, which reads:

“When a person is convicted of an offense under the law of the state and the tribunal before which the conviction is had is authorized by law to commit the offender to the county jail, the court may sentence the offender to the workhouse, if there is such in the county.”

In the case of *Kimbleawecz v. State*, 51 O. S., 228, 229, this statute was held to mean that a defendant convicted in Cuyahoga county should be sentenced to the Cleveland workhouse. Indeed, this court, in case No. 3924, *City of Cleveland v. Commissioners of Cuyahoga County*, affirmed by Supreme Court without report, 80 O. S., 752, specifically held that the commissioners of Cuyahoga county are authorized to contract with the council of the city of Cleveland for the care of prisoners in the Cleveland workhouse.

Second. It is said that the provisions of law respecting persons in workhouse working out their fines, do not accomplish a payment of said fines inuring to the benefit of the county. The statute in question is now Section 4151, General Code, the last clause of which reads as follows:

“In all cases where a fine may be imposed in punishment of an offense, in whole or in part, and the court or magistrate could order that such person stand committed to the jail of the county

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until such fine and the costs of prosecution are paid, the court or magistrate may order that such person stand committed to the workhouse until such fine and costs are paid, or until he be discharged at the rate of sixty cents per day for each day of confinement, or be otherwise legally discharged."

The question is whether the phrase "until he be discharged at the rate of sixty cents per day for each day of confinement" intended that the prisoner pay his fine at the rate of sixty cents a day, by his labor, or is a mere provision for discharge, so that the prisoner be not confined for life.

A test of this question might be invented by putting it in another form, and assuming a situation which would call for its incidental adjudication.

Suppose a man had been fined \$18 and committed to the workhouse until the fine should be paid. At the end of ten day's confinement a friend offers to pay his fine for him. How much must be paid to procure his discharge, the full amount of the fine, \$18, or \$12, the balance after deducting the ten days at sixty cents per day.

Judge Okey in the case of *Cleveland v. Jewett*, 39 O. S., 271, at 272 said:

"A person thus committed to a workhouse may, at any time, pay the amount or *balance* of his fine and costs in money and obtain a release."

The answer to the hypothetical question is thus clearly seen to be \$12. Hence, the prisoner pays his fine at the rate of sixty cents per day.

In order that the clerk may collect his fees of the county, it must also appear that the county treasury has received the fine thus paid by the workhouse prisoner, and on this point the clerk's answer alleges that by reason of said agreement with the city council of the city of Cleveland "the amount to be paid by the county for the care of said prisoners is decreased in the amount realized from this work of said prisoners."

The truth of this allegation is admitted by the demurrer. We think it completes the clerk's defense, and entitles him to the fees claimed.

The demurrer to the answer to the first cause of action should have been overruled, and for error in sustaining it the judgment is reversed.

**ERRONEOUS VERDICT HELD TO HAVE CAUSED NO
PREJUDICE.**

Circuit Court of Cuyahoga County.

E. E. STONEMAN V. THE OHIO CULTIVATOR COMPANY.

Decided, June 2, 1911.

Counter-Claim—Nominal Damages—Costs.

A verdict was erroneously directed against a defendant on a counter-claim under which he had shown himself entitled to nominal damages only; *Held*: No prejudice arose therefrom because it affected the question of costs only, and the costs were properly assessed against the defendant on the plaintiff's claim, set up in the petition.

Frank C. Scott, for plaintiff in error.

Hidy, Klein & Harris, contra.

WINCH, J.; HENRY, J., and MARVIN, J., concur.

Stoneman bought a hay press of the cultivator company, and gave his note for \$150 in part payment thereof. He afterwards sold the hay press to one Kerruish, but as under agreement with the cultivator company, title to the hay press was to remain in it until the entire purchase price was paid, he asked and obtained the cultivator company's consent to a transfer of title of the hay press to Kerruish, who gave his own notes for \$338.40 secured by a chattel mortgage covering the hay press, direct to the cultivator company. Stoneman claims the company agreed to accept Kerruish's note in payment of his note, and to release him, but this is denied by the company. Kerruish failed to pay his notes when due, and the company thereupon sued Stoneman on his \$150 note.

Stoneman answered, admitting the note, but setting up the transaction with Kerruish as a defense thereto. He also set up

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in his answer two counter-claims, one asking damage for the company's negligence in prosecuting a suit against Kerruish for replevin of the hay press, and the other praying compensation for his services in locating the mortgaged property and attempting to save its possession. A reply denied these allegations. The issues were tried to a jury, and at the close of all the evidence, a verdict was directed for the plaintiff for the amount due on Stoneman's note.

This action of the court was proper, so far as the evidence of Stoneman as to the Kerruish transaction was concerned. He failed to show that the Kerruish notes were taken in payment of his note. On the contrary, he proved that the Kerruish notes and chattel mortgage were taken as collateral security to his note.

It seems, however, that he made out a case on the first counter-claim, entitling him to nominal damages for the company's negligence in and about the collections of the Kerruish notes. *Roberts v. Thompson*, 14 O. S., 1.

He might have been entitled to more than nominal damages if he had shown that the hay press was of any value or that Kerruish was insolvent. It may be that Stoneman can not collect the Kerruish notes, a surrender of which he is entitled to upon payment of his own note.

Though there was error in directing a verdict for the plaintiff below, it was not prejudicial to plaintiff in error.

Being entitled to nominal damages only on his counter-claim, a submission of it to the jury would not have changed the result of the case, for costs would go against him in either event.

Certain rulings on evidence have been called to our attention, which seem to have been erroneous, but as they all referred to the issue on the counter-claim, and did not affect the amount of damages thereunder, no prejudice arose therefrom.

Judgment affirmed.

REMEDY UNDER FAILURE OF WARRANTY OF A HORSE.

Circuit Court of Cuyahoga County.

JOHN H. SMART V. GEORGE R. TEEPLE.

Decided, June 2, 1911.

Warranty of Horse—Option to Return Horse and Receive Money Back—Measure of Damages—Special Damages.

1. Where a horse is sold under warranty and one of the conditions of the sale is that the purchaser if not satisfied with the horse after trial thereof, *might* return him the next day and receive his money back, the purchaser has his election, upon breach of the warranty, to return the horse and have his money back, or keep the horse and sue for damages arising from breach of the warranty.
2. In an action for breach of warranty of a horse, the measure of damages is the difference between the value of the horse, if it had been as represented, and its value as it actually was.
3. In an action for damages for breach of warranty of a horse, the plaintiff may show special damages suffered by reason of his carriages being injured by the actions of the horse, and expenses in attempting to cure the horse of distemper.

Smart, Marvin & Ford, for plaintiff in error.*Squire, Sanders & Dempsey*, contra.

WINCH, J.; HENRY, J., and MARVIN, J., concur.

This was an action for damages for breach of warranty of a horse, the defendant denying the warranty and breach thereof; he also alleged that one of the conditions of the sale of the horse was that the purchaser, if not satisfied with the horse after trial thereof, might return him the next day and receive back his money.

There was evidence tending to prove the warranty, its breach, and that the condition mentioned was made, but that the plaintiff refused to return the horse and receive his money and elected to keep the horse and sue for damages rising from breach of the warranty. Verdict and judgment was for the defendant.

The court charged the jury that "if Smart was told at the time of the sale, that if he did not like the horse he might return him,

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then it was the duty of Smart to so return the horse and get his money, and this was a condition precedent to his right to sue for breach of warranty."

This was error; the condition was that the purchaser *might* return the horse; it was optional with him to do so. The law on this subject is well stated in 2 *Mecham on Sales*, 1807:

"In cases where the language is permissible and not mandatory, it is well settled that the buyer, at his option, may avail himself of the special remedy, or waive it and sue at law for the breach of warranty." See also 24 Am. & Eng. Enc. of Law, 1154, and cases cited.

The authorities submitted by counsel for defendant in error are all in accord or consistent with this rule.

The court also erred in his charge as to the measure of damage, which should have been stated as the difference between the value of the horse, if it had been as represented, and its value as it actually was.

The horse having been bought at a well advertised auction sale, the court said:

"If it was an open market sale, properly advertised, wasn't the purchase price of this horse the fair market value of the horse? That is for you to determine from the evidence in this cause, gentlemen. I am not going to say to you that as a matter of law, that was the fair market value of this horse; but I say you must take all things into consideration to show whether or not it was not the fair market value of this horse."

This was misleading, very unfair and extremely prejudicial to the plaintiff.

The court also erred in refusing to admit evidence of special damages suffered by the plaintiff by reason of damage done to his carriages by the actions of the horse and expenses in attempting to cure the horse of distemper. 9 C. D., 218.

For error in the charge, as indicated, and for error in ruling on evidence, the judgment is reversed and the cause remanded for a new trial according to law.

SERVICE UPON A RAILWAY COMPANY IN ANOTHER COUNTY.

Circuit Court of Franklin County.

THE STATE OF OHIO, EX REL ATTORNEY-GENERAL, v. THE HOCKING VALLEY RAILROAD COMPANY ET AL.

Decided, December 2, 1912.

1. A return of service of summons upon an agent of a railway company is defective, if it does not show that the agent served was the agent of the company in the county in which the service was made and that the road runs into or through that county.
2. It is within the option of a party causing a summons to issue to another county to fix the return day on the third or fourth Monday, when he has reason to believe the usual return day will not allow time for service.

Timothy S. Hogan, Attorney-General, *M. A. Daugherty* and *Frank Davis*, for plaintiff.

Lawrence Maxwell, for C. & O. Railway Co.

Wilson & Rector, for H. V. Railway Co.

Doyle & Lewis, for L. S. & M. S. Railway Co.

T. P. Linn, for K. & M. Railway Co.

DUSTIN, J.; FERNEDING, J., and ALLREAD, J., concur.

Heard on motion to quash service on the Chesapeake & Ohio Railroad Company.

We are of the opinion that the third point urged in behalf of the motion to quash the service on the Chesapeake & Ohio is well taken, viz., that the return does not show service upon defendant's agent in a county through or into which such road passes; or that the agent served was an agent in said county.

Nor does the fact appear in the petition that the said defendant operates its road in Hamilton county; and we can not take judicial knowledge of it.

We construe Section 11283, General Code, as permitting the party causing a summons to be issued to another county to have it returnable on the third or fourth Monday, at his option, if he finds or believes that the fixing of the usual return day will not allow sufficient time for service.

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It is entirely for the benefit of the party issuing the service, and the party served can not complain if the earlier and usual day is selected.

Motion to quash service sustained.

**APPROPRIATION BY RAILWAY OF LOTS RESTRICTED TO
RESIDENCES ONLY.**

Circuit Court of Cuyahoga County.

MARY VANETTEN v. THE CLEVELAND SHORT LINE RAILWAY COM-
PANY; AND J. FRANK MASTERS v. THE CLEVELAND
SHORT LINE RAILWAY COMPANY.*

Decided, July 6, 1911.

*Restrictions in Deed—Railroad Company Appropriation—Not an Inter-
est in Land.*

A restriction by covenant in deeds for lots to their use for residences only, under a general plan of the original grantor, is not such an interest in the lots as requires its appropriation before a railroad company owning the lots can construct a railroad upon them.

H. M. Roberts, for plaintiffs.

Kline, Tolles & Morley, contra.

WINCH, J.; NORRIS, J., concurs; METCALFE, J., dissents.

A majority of the court is of the opinion that the plaintiffs are not entitled to the relief they pray for.

Speaking for myself alone, I believe that the judgment in the case of *The Cleveland Short Line Railway Company v. Duncan*, decided April 25th, 1911, 9 O. L. B., 34, is not based solely upon the proposition that the lot owners were guilty of laches in bringing their suits. The journal entry in that case reads:

“On account of such laches, and the character of the alleged interest which plaintiffs below allege they own in said allotments

*Affirmed without opinion, *Vanetten v. Cleveland Short Line Railway Co.*, 86 Ohio State, 323.

and the several lots thereof, to-wit, a restriction by covenant in the deeds for said lots to their use for residences only, under a general plan of the original grantors, the plaintiffs are not entitled to the injunction prayed for."

While still believing, as a lawyer, that the rights of the plaintiffs amount to an "easement or interest" in the lots purchased by the railroad company, to be used as a part of its right-of-way, as expressed in General Code, 11039, yet, as a judge, obedient to the law as announced by the Supreme Court, I bow to its conclusion, necessarily deduced from said decision, as I believe, that plaintiffs have *no such interest* in said premises as require an appropriation thereof before the railroad company can construct its railroad thereon.

The question is not without doubt? It is to be regretted that no opinion was prepared in the Duncan case, for we are unanimous in the opinion that there is no element of laches to be found in the facts of the two cases now before us.

Judge Metcalfe dissents, believing that the Duncan case adjudicates only the question of laches. If he is right as to the force and effect of said judgment of the Supreme Court, there is no flaw in the reasoning by which he reached a conclusion opposite to that of the majority of the court.

The petitions in both cases are dismissed.

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**HOW TO MAKE A RETRACTION AVAILABLE AS A DEFENSE
IN A LIBEL SUIT.**

Circuit Court of Cuyahoga County.

THE AKRON DEMOCRAT V. LAWRENCE CONRAD.

Decided, April 15, 1907.

Libel—Retraction—Excessive Verdict.

1. A retraction of a libel, to be available as a defense, must be unequivocal and refer distinctly to the original article.
2. A verdict for \$500 in a libel case is too much under circumstances shown here.

MARVIN, J.; WINCH, J., and HENRY, J., concur.

The parties here are reversed from the order in which they appeared in the court below, but will be spoken of in this opinion as they were in the court below; that is, the plaintiff in error will be spoken of as the defendant, and the defendant in error will be spoken of as plaintiff.

The defendant is the publisher of a daily newspaper having a large circulation in the city of Akron and elsewhere. In its issue of ———, it published an article headed in large type, indicating that a mystery had been solved in reference to the disappearance from Akron of one Lawrence Conrad, a former resident of Akron. The article then went on to say that one resident of Akron. The article then went on to say that one Lewis, a former resident of Akron, had recently visited in the city, and had stated to a reporter of the newspaper published by the defendant, that Lawrence Conrad, whose schoolmate he had been at the Broadway school house at Akron, years ago, was recently seen by him at a town named in Nevada. The article went into details as to how Lewis came to see him, and then stated that Lewis further said that within a day or two after seeing Lawrence Conrad, he saw an account in a newspaper published near the place where he saw Conrad, that three men had been engaged in a bank robbery, and that one of the robbers had been killed and that a picture of the robber thus killed was published in the paper; that he (Lewis) at once recognized it as Lawrence

Conrad. Then the newspaper went on to say that Conrad had been missing from Akron for some eight or nine years; that his family thought he might have enlisted in the army and navy during that time and been killed, and that they had made efforts to ascertain through the army and navy departments of the government whether this was a fact, but had been unable to learn that it was, and that though this publication would bring disgrace upon his name and pain to his relatives and friends, yet it cleared up the mystery of his disappearance, for the article stated, that during all the time he had been absent from Akron, his family had failed to hear from him.

The plaintiff sued the defendant for this publication as a libel, and stated in his petition that it was made of and concerning him, and prayed for damages.

The defendant denied that the publication was of and concerning the plaintiff, and it is said that this publication could not have been of and concerning the plaintiff, for this publication stated that the man of whom Lewis gave them an account was a man now dead. The defendant further answered that the publication about whosoever it might be was made without any malice, and without any desire to injure anybody or intent to injure anybody, but purely as a matter of news, and upon information which it had a right to rely upon as reliable.

It further answered that a retraction of the publication was made within a day or two after it was made.

The original article published was introduced in evidence. It was further shown in evidence that the plaintiff was the only Lawrence Conrad, who, so far as was known, had ever lived in Akron, and he was the Lawrence Conrad who was in school with this man Lewis. The retraction so-called which was published, it was claimed, was such that, under Section 5094 of the Revised Statutes of Ohio, it rebutted entirely any presumption of malice which arose from the publication of the original article. Without stopping to quote the statute we think the retraction is not as contemplated by the statute. Nowhere in the retraction is it stated or in any wise implied that the newspaper had published any other article in reference to Lawrence Conrad. The heading was in large type, beginning with the word "mistake" and then

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followed with other headlines, in large type, and then the article went on to say that Lewis had made a mistake in stating that Lawrence Conrad had been killed while a bank robber, and went on further that Lawrence was a very respectable man living in Akron. But as tending to show at least that the defendant recognized that the publication so made was of the plaintiff, it is stated in the so-called retraction that Lawrence Conrad, of whom Lewis had made the statements in reference to his being killed in a bank robbery, had called at the office of the defendant and told his story.

It would seem from this that there could be no doubt that the defendant recognized that the article which it had published was of the plaintiff.

Proceeding to say something of the sufficiency of the retraction under the statutes, attention is called to the case of *Gray v. Times Newspaper Co.*, decided by the Supreme Court of Minnesota, and reported in 77 Northwestern Reporter, at page 204. An examination of that case will show that the so-called retraction there published was more full than the one published in this case; the court says, speaking of such retraction:

“The statute does not require the retraction to be in any particular form. It must, however, clearly refer to and admit the publication of the article complained of, and directly, fully and fairly, without any uncertainty, evasion or subterfuge, retract (that is recall) the alleged false and defamatory statements thereon. It is necessary that the retraction should refer to the original publication, in order to be fair, because the purpose of the statute in requiring a publication of the retraction in the next issue of the newspaper after service of the notice and in as conspicuous a place and type as was the article complained of, is to eradicate so far as possible from the minds of the persons who read the libel the false and unfavorable impressions of the plaintiff engendered thereby.”

Our statute, in its provisions as to retraction says, that it may be made “upon demand and within a reasonable time.”

On the part of the plaintiff in this case it is insisted that the publication of this so-called retraction was not made upon demand; whereas on the part of the defendant it is insisted that

what took place at its office at the time the plaintiff called upon them was in effect a demand.

We regard it as unnecessary to determine whether a retraction of a publication without a demand would be equally effective to release the publisher from the imputation of malice as one publication upon demand, and we deem it unnecessary to determine whether this so-called retraction was published upon demand; for we agree with the language used by the trial judge that this publication was not a retraction.

From the evidence it is clear that the defendant did not make the publication with any desire to injure the plaintiff, or anybody else, although it recognized, as appears by the article itself, that it would bring disgrace upon the name of the man about whom it was published; but, in its earnest desire for early news it made this publication as we think, without sufficient investigation, and under such circumstances that the plaintiff is entitled to compensatory damages for that publication. But from the fact that in the very nature of things, those who knew the plaintiff at all must have known that the publication was not true, because they must have known that he had not been absent from Akron for eight years or more, as the article stated, we think the damages assessed, namely, \$500, was altogether too high, and unless the plaintiff will remit from this judgment the sum of \$350, the judgment will be reversed and the case remanded for a new trial. If such remittitur is made the judgment for the \$150 remaining will be affirmed.

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DEED AS MODIFIED BY A CONTRACT.

Circuit Court of Lorain County.

THOMAS C. JOHNSON, ADMINISTRATOR, v. HENRY B. KENDEIGH,
BENJAMIN KENDEIGH AND GRACE KENDEIGH.

Decided, May 1, 1907.

*Deed Absolute Construed as Mortgage—Administrator May Maintain
Suit to Have Deed so Construed.*

1. A deed absolute, with contract for reconveyance will be construed as a mortgage, rather than as a conditional sale, if the equities of the case require it.
2. An administrator of the deceased grantor of such a deed, may maintain an action to have it construed as a mortgage, but the relief granted will be a conveyance of the property to the heir or devisee, upon payment of the mortgage debt, such conveyance to be subject to the debts of the decedent.

E. G. & H. C. Johnson, for plaintiff in error.

D. J. Nye, Stroup & Fauver and *E. G. & H. C. Johnson*,
contra.

MARVIN, J.; WINCH, J., and HENRY, J., concur.

Jonas E. Kendeigh lived in North Amherst, Lorain county, Ohio, and at one time owned a certain parcel of real estate. He died testate, devising by a will, duly admitted to probate, whatever property he left, to the defendant, Benjamin Kendeigh. The real question in this case is whether he owned this real estate at the time of his death, which occurred April 25, 1904.

On the 18th of May, 1903, said Jonas E. Kendeigh executed and delivered to the defendant, Henry B. Kendeigh, a deed of the real estate mentioned. This was in form a deed of general warranty. On the same day some arrangement was made with reference to this real estate, which was to modify the ownership of the grantee in the lands described in the deed, and on the 23d day of May, as we hold, to carry out the agreement made on the 18th, Jonas E. Kendeigh and Henry B. Kendeigh executed a written instrument.

This instrument reads as follows:

“Articles of agreement entered into at North Amherst, Ohio, this 18th day of May, A. D. 1903, by and between Henry B. Kendeigh, party of the first part, and Jonas E. Kendeigh, party of the second part.

“Witnesseth: That whereas second party is now the owner of certain real estate hereinafter described, and said real estate is about to be sold upon execution by the sheriff of Lorain county, Ohio, to satisfy two certain judgments obtained by the North Amherst Bank Co. And whereas, the parties hereto have mutually agreed that second party should convey said real estate to first party and that first party would pay said judgments and all costs thereon, and allow second party to hold possession of the living rooms for life and balance of said real estate for one year, providing second party lives one year and first party would pay the taxes on said premises during said period of time.

“And second party should have the right to redeem said real estate at any time during said period of one year if second party should die before the expiration of one year, in that event the contract shall be void and first party's title in and to said premises shall be absolute. If second party redeems said real estate and pays to first party his heirs or assigns all money paid out on said real estate at seven per cent. interest, first party his heirs or assigns shall convey said real estate by a good and sufficient deed to said second party.

“If said property should be sold during this time of one year for more than what first party paid, then said over amount shall be divided as herein mentioned. Second party agrees to pay first party one-half of all moneys over first party's claim.

“Now, therefore, said second party having this 18th day of May, 1903, executed and delivered to first party a good and sufficient deed for said real estate, and said first party having this day paid said judgments, interest, costs and taxes, and in all the sum of \$1,013.83 to date.

“Said real estate is described as follows, to-wit:

“Situated in the village of North Amherst, county of Lorain, and state of Ohio, and known as the whole of village lot number 121 in Harris Addition in said village subject to right-of-way of the L. S. & M. S. Railway Company. Also the east part of village lot number 120 in said Harris Addition in said village, which parcel is bounded on the north, on the south, on the east, by the respective lines of said lot; and on the south by the respective lines of said lot and on the west by lands in said lot owned by Homer Wilford. Said parcel being fifty-five feet from east to west. Also one other parcel of land in said village and

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bounded and known as being a part of township lot number 24 in Amherst township, and being within said village. Bounded on the north by the right-of-way owned by the L. S. & M. S. Railway Co., on the west by the said lots Nos. 120 and 121, and on the south and east by West Railroad street.

"Second party agrees to occupy said premises in a safe and careful manner, and that he will not suffer any of said premises to go to waste and that he will do no damages to any of the buildings thereon. Each of the parties agree that they will do and perform the several things herein mentioned for them to do and perform, and each agrees to all the terms and conditions hereof. In witness hereof, the parties set their hands to duplicates hereof this day and year first above written.

"In witness whereof we hereunto set our hands and seals this the 22d day of May.

"HENRY B. KENDEIGH,
"J. E. KENDEIGH.

"Witnessed by

"E. C. SCHULER,

"A. H. KENDEIGH.

"State of Ohio, Lorain Co.

"Sworn to and subscribed before me a Notary Public this the 22d day of May, A. D. 1903, and by Henry B. Kendeigh and J. E. Kendeigh.

"(Seal.)

E. C. SCHULER,
"Notary Public."

On the part of the plaintiff and of Benjamin Kendeigh, who has answered in this case, it is claimed that the deed already mentioned and this contract construed together, as we hold they should be, make the deed in effect a mortgage, to secure to Henry B. Kendeigh the payment of \$1,013.83, which amount was furnished by Henry B. to Jonas on the said 18th day of May, and which was used for the paying off of certain liens already existing upon this real estate.

On the other hand it is urged that this contract was simply a conditional sale by Henry to Jonas. We hold that when the deed and this contract are construed together, the deed must be treated as a mortgage, that is, as a pledge of this property for the security of the debt which Jonas owed to Henry B.

In *Cottrell v. Long*, 20th O. S., 464, the syllabus reads:

"If a contract for the conveyance of land be intended as security for a debt, it is a mortgage, whatever may be its form or the name given it by the parties."

In *Hurley v. Estes*, it is said:

“When an instrument is given as security for the payment of money or the performance of some collateral act, it is a mortgage, whatever may be its form.”

In the case of *Slutz v. Desenberg*, 28 Ohio State, 370, there is a very full discussion of the distinction between those contracts where there is a deed from one party to the other, and a contract back in reference to the property being re-conveyed; as to the distinction which makes in the one case the deed an equitable mortgage, and which makes in the other the contract a conditional sale, and a large number of authorities are cited in that opinion. In that case Judge Ashburn at page 376 uses this language:

“A mortgage, when in form a deed absolute, and a conditional sale, are frequently so nearly allied to each other that it is sometimes difficult to say whether a particular transaction is the one or the other.”

We find in this case no small difficulty in determining which class of cases the facts in this case seem to put the case. But there are significant words in this contract, which, we think, bear upon the question. It is provided, among other things, that the second party is to hold possession of the living rooms for life, and the balance of the real estate for one year, providing the second party lives one year, and the first party should pay all taxes on said premises during said period of time. Also the second party should have the right to redeem said real estate at any time during said period of one year. Again, if said second party redeems said real estate, and pays to said first party all the moneys so paid out by him together with interest at seven per cent., he will at any time on or before one year from the date of said contract, execute and deliver to said second party a good and sufficient deed for said real estate.

Now we think the use of the word “redeem” tends to negative the idea that it was in contemplation of the parties that Henry B. should sell the property to Jonas for a given price within the year, but it being spoken of as giving Jonas the right to redeem the property, implies that it was simply pledged to

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Henry. Again, this language is used: "If said property should be sold during this time of one year for more than what first party pays, then said over amount shall be divided as herein mentioned."

"Second party (which is Jonas) agrees to pay the first party one-half of all money over the first party's claim."

These several clauses of the contract, considered in connection with the entire contract, lead us to the conclusion that the property was pledged by Jonas to Henry B., and that, therefore, the deed held by Henry is in equity a mortgage for the security of the money paid out by him for Jonas or paid to Jonas, and this he is entitled to have, together with the interest at seven per cent.

The evidence is that the property is worth at least seventy-five per cent. more than the amount paid into it by Henry B. and we are not disposed to stretch a point to aid Henry B. in securing this unconscionable advantage.

It may be said that Henry's equities are fully as strong as Benjamin's; this being true, there seems to be no very strong equity in favor of either, but Henry B. will receive all the money he has ever paid in the property, together with seven per cent. interest on it, and Benjamin will receive only that which his uncle Jonas saw fit to bequeath to him.

This suit was brought by the administrator, directed against Henry B., and there is a prayer in the petition that the property be conveyed by Henry B. to the plaintiff as administrator. This course can not be taken. The administrator is not entitled to have the property conveyed to him, but he is entitled to have the deed held to be a mortgage, and upon payment by Benjamin, to whom the property is devised, to Henry B. of the amount of the indebtedness from Jonas to Henry B., Benjamin will be entitled to have the property conveyed by Henry B. to him, free from any liens or incumbrances which Henry B. has put upon it, or may have put upon it, but it will, of course, be subject to be sold for the payment of any debts of Jonas.

SAVING OF RIGHTS IN CASE OF A REVERSAL.

Circuit Court of Franklin County.

CHARLES C. HIGGINS v. THE TURNEY & JONES COMPANY ET AL.

Decided, July 30, 1912.

The period of one year within which a new action may be brought inures to a plaintiff whose judgment below has been reversed, and also to a plaintiff who failed in the trial court otherwise than on the merits.

DUSTIN, J.; ALLREAD, J., and FERNEDING, J., concur.

The point suggested by counsel for plaintiff in error that his action is within time under Section 11233, General Code, because brought within a year after a dismissal "otherwise than upon its merits" by the circuit court, on appeal, is not, in our view, well taken.

The case of *Cummings v. Dougherty*, 31 Law Bulletin, 140, does not, we think, state the law.

If a plaintiff wins in the trial court, but the judgment is reversed in the upper court, he has a year after reversal in which to bring a new action; or, if he fails *in the trial court* otherwise than upon the merits, he has the same right.

In the case at bar Jones failed in the trial court upon the *merits*, viz., upon a demurrer to the facts. By taking an appeal he took the chances of losing by limitation of time. The dismissal of the appeal and the affirmance on error did not, we think, work an extension.

Judgment affirmed.

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CONSTRUCTION OF DEVISE TO WIDOW.

Circuit Court of Lorain County.

WILLIAM WHITE ET AL V. EDGAR M. FREEMAN ET AL.

Decided, May 1, 1907.

Will—Life Estate—Remainder Over.

The will of Jacob Henry White, after providing for the payment of his just debts and funeral expenses and one dollar to each of his three children, willed his property as follows:

"Third. All the rest of my property and estate I give and devise and bequeath to my beloved wife, Frances S. White, giving her full right and power to adjust and settle all claims due me at my death.

"Fourth. At the death of my said wife, Frances S. White, I will that all property and estate remaining after settling all claims due, such as expenses of last sickness and funeral expenses, and all that remains of my estate, to be divided equally, between my son William White, Dora Stock, and the heirs of my son John White. That is to say, one-third of the remaining parts of my estate to William White, and one-third part of my estate of Dora Stock, and one-third part of my estate to the children of my son John White."

Held: The widow took a life estate in the fund left by her husband, from which should be paid the expenses of her last sickness and funeral expenses and the remainder to those named in her husband's will.

C. A. Metcalf, for plaintiffs in error.

W. B. Johnson, contra.

MARVIN, J.; WINCH, J., and HENRY, J., concur.

The parties here are as they were in the court below. Plaintiffs sued to recover from defendants certain money which they claim under the will of Jacob Henry White, deceased, and which the defendants claim under the will of Frances S. White, deceased.

Jacob Henry White, a resident of Lorain county, Ohio, died testate. His will was admitted to probate in said county on the 21st day of July, 1900. He left a widow, Frances S. White, who died testate March 25th, 1906.

His will reads as follows:

"In the name of the Beloved Father and of all, Amen:

"I Jacob Henry White, of the township of Pittsfield, county of Lorain and state of Ohio, being about 70 years of age and being of sound and disposing mind and memory, do make and publish and declare this my last will and testament hereby revoking and making null and void all other last wills and testaments by me made heretofore.

"First. My will is that all my just debts and funeral expenses shall be paid out of my estate as soon after my decease as shall be found convenient.

"Second. I give, devise and bequeath to my son, William White, now residing in Pittsfield, Lorain county, Ohio, the sum of one dollar, \$1.00. To my son John White, now living in Wellington Ohio, I give to him the sum of \$1.00. To my daughter, Dora Stock now living in Grafton, Ohio, I give to her the sum of one dollar.

"Third. All the rest of my property and estate I give and devise and bequeath to my beloved wife, Frances S. White, giving her full right and power to adjust and settle all claims due me at my death.

"Fourth. At the death of my said wife, Frances S. White, I will that all property and estate remaining after settling all claims due, such as expenses of last sickness, and funeral expenses, and all that remains of my estate, to be divided equally between my son William White, Dora Stock, and the heirs of my son John White. That is to say, one-third of the remaining parts of my estate to William White, and one-third part of my estate to Dora Stock, and one-third part of my estate to the children of my son John White.

"Fifth. I nominate and appoint my said wife and William Stock, of Grafton, Lorain county, Ohio, executors of this last will and testament. I desire that no bond as such executors be required, and that no appraisal be made of my estate; and the probate judge of Lorain Co., Ohio, omit the same if it can be legally done.

"Dated June 23, 1898.

"JACOB HENRY WHITE.

"Witnesses,

"H. M. PIERCE.

"R. N. GORDU."

By her last will the widow, Frances S. White, bequeathed her entire property to these defendants.

What transpired in relation to his property after the death of Jacob Henry White is found by the court of common pleas as follows:

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“First. That the plaintiffs are the same persons named in the last will and testament of Jacob White, who died at the date set forth in the petition, as entitled to what remained of his said estate after the interests of said Frances White were disposed of. That the copy of the will attached to the petition is a true copy of said will.

“Second. That said Frances White made the application for the probate of his said will, and for letters testamentary to be issued to the persons named as executors in said will in which she testified that his estate consisted of about \$500 of personal property and that both she and said William Stock were appointed and qualified as executors under said will, under the terms of which she as such widow elected to take.

“Third. That the amount for distribution under said will was \$314.22, all of which was paid over to the said Frances White under the terms of said will as such widow, in the fall of 1900, who mingled said money with her own, and kept it so mingled during her life, and died on the 25th day of March 1906, having in her possession more than \$314.22 in money and other property, all of which was so held under claim of right thereto by her, and she died leaving a will by the terms of which she devised and bequeathed to the said Amy Freeman all the property real and personal of which she should die seized. The said Amy Freeman and Edgar M. Freeman, were during all said time and still are husband and wife, and said Amy was the niece of said Frances White, whose sister was Amy's mother. That said Freemans cared for said Frances for some years before her death in various ways, she living near them by herself. That if they are allowed for their care of her what it is reasonably worth, it would amount to said sum of \$314.22 and more. That the expenses of her last sickness and funeral and burial amount to \$75 and were paid by said Freemans. There was no evidence of any other or further claims against the estate of said Frances White or against her in her lifetime, either due, paid or owing to any one, either before or after her death.

“Fourth. That at the death of said Frances the said Freemans took and appropriated to their own use all the property which the said Frances had in her possession and no part thereof has been paid to the other persons named in said Jacob's will.

“Fifth. That said will was written upon the ordinary will blank, and ‘Item I’ thereof is wholly printed as a part of such blank form, no part thereof being in writing.

“Sixth. There was no evidence that the said Frances promised to pay said Freemans for the care they bestowed upon her, but the court finds that said care was necessary for her com-

fort and support, and that she had told said Freemans of the said will to said Amy before said support and care were so bestowed upon her.

“Seventh. That said Frances was the second wife of said Jacob, and the step-mother of all his children, and said Freemans were not related to him except through his marriage to her.

“Eighth. That the said Frances had and kept an estate separate from said Jacob. That at the time of their marriage the said Jacob was living upon a farm of fifty acres having a life use thereof, and having some personal property upon the farm, and possibly some money, just how much is impossible to ascertain, but the court finds that it did not amount to very much. Under these circumstances he married said Frances. Soon after their marriage said Frances began to receive payments upon a legacy of \$1,000 due her, and up to 1900 all but \$160 of the \$1,000 had been paid either to said Frances or to said Jacob White, the greater portion having been paid to him. That at the death of said Jacob said Frances had certain debts due her, which aggregated \$760 and which she collected and mingled with said \$314.22, which she received under her said husband's last will. That she used the money thus mingled together for her support for six years and died leaving \$740 thereof, in her possession, which she willed to the said Amy Freeman. That the said Frances White used more than the said \$314.22 for her support during the six years she lived after the death of her said husband aforesaid.”

The controversy here is as to whether at the time of the death of Frances any of the property then in her possession was held by her in trust for the plaintiffs. If so, how much?

If she became by the will of Jacob, the absolute owner of the residue mentioned in the third item of his will, then the plaintiffs were not entitled to recover. If she held all or any part of it in trust, then plaintiffs were entitled to recover the amount of such trust property.

The proper construction of the will of Jacob Henry White determines the entire controversy.

This will was executed by using a printed blank, and the first item is entirely in print and as already quoted reads:

“First. My will is, that all my just debts and funeral expenses shall be paid out of my estate as soon after my decease as shall be found convenient.”

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The remainder of the will is in writing.

By the third item, as already quoted, it will be seen that the residuum of the estate is given to Frances. in such terms that, but for what follows, there could be no question as to her becoming the absolute owner under it, by accepting its provisions, as she did.

By the fourth item, however, he undertakes to say what shall become of certain property after the death of Frances and it is contended by the plaintiffs that the language of this item qualifies the ownership in Frances created by the third item.

This, as we hold, depends upon the meaning of the following language in this fourth item. viz, "Remaining after settling all claims due, such as expenses of last sickness and funeral expenses."

If these words were intended as simply a repetition of the printed words of the first item, "My will is, that all my just debts and funeral expenses shall be paid out of my estate," then this fourth item would be in effect a bequeathing of the same property twice. First to Frances and second to those named in the latter part of the fourth item, and the two bequests being repugnant the one to the other. it may at least well be doubted whether the first taker did not become the absolute owner of the property so that there could be nothing for those named in the later item. *Steur v. Steur*, 8 C.C.(N.S.), 71; *Widows Home v. Lippardt*, 70 O. S., 261; *Stuart v. Walker*, 72 Maine, 145.

We are of the opinion, however, that the words last quoted from the fourth item were not intended as a repetition of the words last quoted from the first item. but that the testator plainly intended that out of the property named in the third item, the expenses of the last sickness and funeral expenses of Frances should be paid, and that what should remain of the property named in the third item. after such payment, should go to the parties named as takers after the death of Frances.

With this understanding of the words last quoted from the fourth item, we hold that the estate of Frances in this residuum was a life estate, with power to charge the same with the ex-

penses of her last sickness and her funeral expenses, and that after these expenses are deducted the balance should go to the plaintiffs. We are not unmindful that there is room for doubt as to the legal effect of the bequests, even construing the words to mean as we construe them, but we feel that our holding is justified by the decision of the Supreme Court in *Johnson v. Johnson*, 51 Ohio State, 446; *Baxter v. Bouryer*, 19 Ohio St., 489, and other cases, and though some of the language used in the opinion in *Widow's Home v. Lippardt*, *supra*, may indicate that the learned judge, who prepared the opinion, entertained views not in conformity with our views, there is nothing in the syllabus which conflicts with this decision, nor was there anything in the case necessary to be decided, which would involve the question involved in this case.

The judgment is reversed, and as the court there found expenses of the last sickness and funeral expenses to be \$75, this court will enter judgment for the plaintiffs for \$314.22, less \$75, or \$239.22, and interest.

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Summit County.

**INCUMBRANCE AFFECTING THE PHYSICAL CONDITION
OF LAND CONVEYED.**

Court of Appeals for Summit County.

LEO KUNKLE V. MATILDA BECK AND JOHN BECK.

Decided, April Term, 1913.

Covenants Against Incumbrance—Notorious and Visible Incumbrances Which Affect the Physical Condition of the Land—Not Excepted From the Rule as to Incumbrances Affecting Title, When—Parol Agreement in Contravention of Terms of the Deed—Available Only in an Action to Reform the Deed.

1. There is no difference between incumbrances which affect the title and those which affect the physical condition of the land, and where a right-of-way has been granted, which exists solely for the benefit of a private person or corporation, it constitutes a breach of covenant against incumbrances.
2. A pipe line is a private enterprise, notwithstanding the public are interested in procuring the product which it transports, and such a line does not stand in the same category as roads and highways.

METCALFE, J.; NORRIS, J., and POLLOCK, J., concur.

Plaintiff here was plaintiff below, and this cause comes before us on demurrer to the defendant's answer. The petition alleges, in substance, that the plaintiff purchased from the defendants, and the defendants conveyed to him by warranty deed a certain farm. That the deed contained the usual covenants of title and against incumbrances. That prior to the execution of said deed to plaintiff defendants had granted and conveyed to the East Ohio Gas Company a right-of-way across said farm, by which a perpetual right was granted to that company to maintain and operate a gas pipe line thereon for the transportation of gas, and that said line had been laid down and has ever since been maintained and operated by the company. Plaintiff claims that said right-of-way constitutes an incumbrance on said farm which lessens its value and thereby causes him damage.

Defendants in their answer admit the execution of the instrument conveying to the gas company the right-of-way in question

and that the company has laid and maintained a pipe line across said right-of-way. For a second defense the defendants say that before the execution of the plaintiff's deed, and while the plaintiff and defendants were negotiating about the sale of the farm they informed the plaintiff that they had conveyed such right-of-way to the said gas company, and that the plaintiff had knowledge of the fact that a pipe line had been laid across said land. That the physical evidence of the fact was visible to the plaintiff, and that while said negotiations were in progress plaintiff inquired of them what consideration they had received for conveying said right-of-way, and when informed of the amount asked to have the same deducted from the purchase price of the farm, which was agreed to by defendants, and the sale consummated in accordance with such agreement. In a third defense the defendants aver that such right-of-way is not an incumbrance in any way affecting the title to the property, but is merely an easement affecting its physical condition, and that the plaintiff having knowledge thereof is estopped from claiming the same to be an incumbrance.

Plaintiff demurred to the answer and the common pleas court overruled the demurrer, and the plaintiff not pleading further judgment was entered against him on the pleadings. Error is prosecuted in this court and the only question is whether the common pleas court erred in so holding.

In our judgment the common pleas court erred in overruling the demurrer. The matter set forth in the second defense is a parol arrangement between the parties made before the execution of the deed, which is clearly in contravention of the terms of the deed itself. While this matter, if properly pleaded, might constitute a good cause of action to reform the deed, it is no defense in an action on the covenant against the incumbrances, and parol evidence would not be admissible to prove such an understanding. *Long v. Moler*, 5 O. S., 271.

As to the matter set forth in the third defense, a question much more difficult of solution is presented. It is urged with much ability that the incumbrance, being open, notorious and visible is not such an incumbrance as affects the title, but only

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affects the physical condition of the land, and that the plaintiff having knowledge of its existence at the time of the purchase of the farm can not now be heard to complain that it is a damage to him. Many authorities are cited upon this proposition, and there seems to be respectable holdings that where the right-of-way is a public highway, or a railroad which was known to the parties at the time of the conveyance that its existence furnishes no basis for an action for breach of the covenant against incumbrances. *Cutts v. McKinnon*, 22 Wis., 628; *Mimmert v. McKeen*, 112 Pa. St., 315; 30 L. R. A., (N. S.), 833, and note.

But where the right-of-way is a private one existing solely for the benefit of a private person or corporation, we think the decided weight of authority is to the effect that such incumbrance constitutes a breach of the covenant.

In *Long v. Moler*, above cited, it is held that incumbrances known to the parties at the time of the conveyance are not presumed to be excluded from the operation of the covenant.

The correct rule, as we think, is clearly stated in *Huyck v. Andrews*, 133 N. Y., 81. In this case it was held that the right to maintain a mill dam constituted a breach of a covenant against incumbrances, though the easement was perfectly visible to the grantee, and was known by him at the time he purchased the premises.

“There is no distinction in this respect between incumbrances which affect the title, and those simply affecting the physical condition of the land.”

In this case the cases of *Cutt v. McCune*, 22 Wis., 628, and *Mimmert v. McKeen*, 112 Pa. St., 315, both of which are cited and much relied upon by counsel for the defendant in error, are disapproved. On page 90 it is said respecting these cases:

“They open to litigation upon parol evidence in every action for the breach of the covenant against incumbrances, caused by the existence of an easement, the question whether the grantee knew of its existence; and in every such case the protection of written covenants can be absolutely taken away by disputed oral evidence. We think the safer rule is to hold that the covenants in a deed protect the grantee against every adverse right, interest or dominion over the land, and that he may rely upon them for

his security. If open, visible and notorious easements are to be excepted from the operation of covenants, it should be the duty of the grantor to except them."

And our own Supreme Court in *Long v. Moler, supra*, seem to be of the same opinion. On page 274 it is said:

"The covenant embraces in terms all incumbrances whatsoever and excepts none whatsoever. * * * The parties may have had an understanding resting in parol to the effect that the taxes of the current year were to be excepted from the operation of this covenant. But this we can not know; for parol evidence is inadmissible to contradict or vary the plain provisions of the deed. The application of the rule may possibly in this case work injustice to the defendant. If so, we can only regret it; for the rule itself, being a salutary one, must be maintained."

The following cases also, we think, support the view we have taken in this case: *Ladd v. Noyes*, 137 Mass., 151; *McGowen v. Myers*, 14 N. W., 788; *Teague v. Whaley*, 50 N. E., 41; *Myers v. Munson*, 21 N. W., 759.

We are satisfied that the rule contended for that open, notorious and visible incumbrances are excepted from the operation of covenants against incumbrances finds no support in the Ohio decisions. It is urged that the right-of-way granted to the gas company is in the nature of a public easement, but we are unable to accept this view. Whatever the rule may be with regard to highways, we do not think that this pipe line can be regarded in the same category with roads and highways. Its construction was a private enterprise, and the fact that the public are interested in procuring the product which it transports does not make it any the less so.

Judgment of the common pleas court is reversed and the cause remanded with instructions to sustain the demurrer.

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Cuyahoga County.

ERROR IN SUSTAINING OBJECTION TO HYPOTHETICAL QUESTION.

Circuit Court of Cuyahoga County.

AGNES L. HIXSON V. JAMES W. RABE.

Decided, April 15, 1907.

Evidence—Witness—Recalling Out of Order—Abuse of Discretion—Hypothetical Question—Opinion Evidence.

1. It is an abuse of discretion to refuse to permit a witness to be recalled for the purpose of re-examination on matters she has already testified to, where her original answers are ambiguous and it is desired to make them definite, if possible, so as to lay the ground for putting an hypothetical question to an expert witness.
2. Upon the putting of a proper hypothetical question to a medical expert witness the court, before passing upon objections to the question said to the witness: "Could you answer that question, if under the law it were competent?" to which the witness replied: "It would be a very hard question to answer." Whereupon counsel asked: "Have you an opinion—could you give an opinion, that is the question," to which the witness replied: "I could possibly give my own personal opinion," whereupon the court sustained the objection to the hypothetical question, not only as to this witness, but as to other expert witnesses, to whom it was afterwards put.
Held: error.

*A. J. Wilhelm and Grant & Sieber, for plaintiff in error.**Allen, Waters, Young & Andress, contra.*

MARVIN, J.; HENRY, J., concurs; WINCH, J., dissents.

The parties here are as they were in the court below. Suit was brought by the plaintiff against the defendant, charging that on the 14th of January, 1905, at about 7:30 P. M. she fell upon the ice on a sidewalk in the city of Akron, and that her weight came upon her hand in such wise as to cause a fracture near the wrist, which is called a "colles fracture"; that she employed the defendant, who is a physician, to attend her on account of this injury to her arm; that he did attend her and undertook the management and care of her injury; that he did

it carelessly and unskillfully, setting out the details in which she says there was such want of care and skill as should have been exercised, and that as a result, her wrist and hand became permanently disabled, and she prays for damages.

The defendant admits that she received the injury, and that he undertook her treatment, but denies that there was any want of skill or proper care, or that she has suffered injury by reason of any failure on his part to perform his whole duty.

The fact is that the doctor first adjusted the broken parts of bone in such wise as he thought and, we think, from the evidence, was proper. He then placed bandages and wooden splints upon the arm in such wise, as from the evidence, we think, was proper. The accident happened on Saturday evening. The Tuesday following the doctor put what is called a plaster of Paris cast upon the arm, extending from a point below the elbow to some place upon the hand. The plaintiff herself testifies that it came to "the first of the fingers." And this cast was left upon the arm for five and a half weeks. The doctor did not call upon her or do anything further for her arm, though she called him twice by telephone, until five and a half weeks after the cast was put on, when he removed it, and her fingers are stiffened and the hand stiffened; the claim on the part of the plaintiff being that this resulted from improper treatment, and especially from the improper way in which the hand was left in this cast.

Medical evidence was introduced tending to show that a proper treatment of a case of this kind would be to have a "passive motion" of the fingers begun very early after the injury, and continued to some extent all the way through. By "passive motion," it is explained is meant that either the patient with the other hand should move the fingers back and forth, or that some other person should so move them. The plaintiff testified that by reason of the way the cast was put upon her hand it was impossible to have this passive motion.

Counsel for the plaintiff having examined the plaintiff herself and other witnesses, including two medical men, a motion was made to direct a verdict for the defendant. Thereupon the

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plaintiff asked leave to re-open the case and to ask further questions of the medical witnesses, or at any rate of one of the medical witnesses, and he then called Dr. Cauffield, who had already been examined and the record shows the following took place:

“Q. Doctor, assuming that the plaintiff’s hand was placed in a plaster cast extending from the elbow to the tips of the fingers.

“THE COURT: I beg your pardon, Senator, I don’t think there is any such evidence. We might as well settle that right here. It is ‘down to the first of the fingers,’ is the language of and the testimony of the plaintiff. The court just looked it up, it is fresh in his mind—‘Down to the first of the fingers’ is the language of the witness.

“MR. SIEBER: Then we will say to the—

“THE COURT: The court just looked it up to be certain about it.

“MR. SIEBER: If Your Honor please, then I will have to ask for the privilege of putting on the plaintiff to ask her one question.

“MR. WATERS (who represented the defendant): I object to that. I do not believe in patching up testimony in this way. The plaintiff spoke and deliberately spoke the truth.

“THE COURT: In view of the answer given I think I will let the answer stand as it is.

“MR. SIEBER: If Your Honor please, I think that the record is not right in that respect. I do not want to say anything in front of the jury here.

“THE COURT: The jury may be excused a moment.

“Thereupon the jury retired.

“THE COURT: I think I will not permit the recalling of the plaintiff on that matter.

“MR. SIEBER: I except, and I expect that the witness would testify, if it please Your Honor, that the cast was placed upon the arm and hand extending from pretty near the elbow to the ends of the fingers and thumb, of course, including the thumb. If Your Honor will not permit that, there is no use in putting the question, and in my judgment, Your Honor, it would result in a miscarriage of justice. I do not think Your Honor wishes that.

“THE COURT: No, I think it would be a great prejudice—an unwarranted prejudice, and this court could not justify it in view of the plaintiff’s own testimony, and from the very fact that counsel did not press the matter farther, except as to the hand being in, would tend to show at any rate that counsel understood it exactly as the court.

“MR. SIEBER: Your Honor please. * * *

“THE COURT: I have ruled on that and we will not spend any more time on it.”

Other proceedings show the court took the position indicated in what has already been quoted.

In this we think the court erred. The discretion of the court as to the admission of evidence, after the plaintiff had testified, having been exercised to the extent of allowing the medical witness to be recalled, in view of what it was stated it was expected the plaintiff would testify to, the court should have permitted the plaintiff to be recalled. We think there was sufficient indefiniteness in the answer given by the witness, that the cast came down to “the first of the fingers,” and her statement that because of the way in which the cast was on her hand there could not be the passive motion of the fingers, to justify the court in allowing this witness to be recalled and the court should have permitted this witness to be recalled.

Counsel for plaintiff then inquired of Dr. Cauffield as follows:

“Q. Doctor, suppose that this arm and hand were dressed in such a manner that passive motion was not possible, by being placed in a plaster of Paris cast, and left there for the period of five and a half weeks, without attention, what do you say, in your judgment as to whether or not, leaving the hand in that condition for the period of five and a half weeks, contributed to the stiffness that you now find in the plaintiff’s hand?”

This was objected to.

“THE COURT: Before I pass it let me ask the doctor this question:

“Q. Could you answer that question, if under the law it were competent? A. It would be a very hard question to answer.

“MR. SIEBER: Have you an opinion—could you give an opinion, that is the question? A. I could possibly give my own personal opinion.

“THE COURT: I will sustain the objection to the form of the question.”

The counsel for the plaintiff here stated, that if permitted he expected the witness would answer, that leaving the splints on

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in that condition for that length of time would contribute to the stiffness that he now finds in the plaintiff's hand and fingers.

Another question of like import followed, and objection to it was sustained, and exception taken.

In this we think there was error.

Following these, other questions of like import were asked of Dr. Cauffield, and Dr. Fouser was also called, and similar questions asked of him, objection to which were sustained.

In this we think the court erred, and the court erred in directing the jury to return a verdict for the defendant.

Several of the hypothetical questions put to both Dr. Cauffield and Dr. Fouser, objection to which were sustained, were within the description of the treatment of the case as described by the plaintiff, and answers should have been permitted thereto, and the plaintiff herself should have been given an opportunity to say, so that there could have been no misunderstanding about it, to what point on her hand the plaster cast reached, and for this error the judgment is reversed and the case remanded to the court of common pleas for new trial.

The presiding judge does not concur in the conclusion reached in this case.

**PROHIBITION OF SALE OF INTOXICATING LIQUORS IN A
RESIDENCE DISTRICT.**

Circuit Court of Lorain County.

IN THE MATTER OF THE PROHIBITION OF THE SALE OF INTOXICATING LIQUORS IN A CERTAIN RESIDENCE DISTRICT IN THE CITY OF LORAIN, BEING PART OF WARDS 1 AND 2.

Decided, May 1, 1907.

Residence District Local Option—Boundary of District—Determining Qualifications of Petitioners—Cross or Intersecting Street.

1. The east rail of an electric railway company is a sufficiently recognized line to serve as a boundary of a proposed dry district under the residence district local option law.
2. In determining whether a petition for a dry district is signed by the requisite number of qualified electors within it, the judge with whom the petition is filed need not himself verify it from the poll-books and registration lists, but may take the testimony of another who has done so.
3. A street which enters but does not cross another street, is not "a cross or intersecting street," within the intendment of the residence district local option laws.

J. F. Stranick, for plaintiff.

G. A. Resek, contra.

MARVIN, J.; WINCH, J., and HENRY, J., concur.

On the 23d of February, 1907, a petition was filed with the Hon. C. G. Washburn, a judge of the Court of Common Pleas of Lorain County, Ohio, which was signed by a large number of persons representing themselves as qualified electors, within a certain described portion of the city of Lorain and said county. The object of the petition was to prohibit the sale of intoxicating liquors as a beverage in a described district in said city. To this petition certain parties filed an answer, denying that the petition was signed by a majority of the voters of the district described in the petition, averring that the district described in the petition was not bounded by well recognized lines or

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boundaries, and that the petition describes a district which contains the property abutting on a section of West Erie avenue, lying between Broadway and Joubert street, which are two consecutive cross and intersecting streets, sixty-five per cent. of the frontage of which section of West Erie avenue is in the central or main business part of the city of Lorain.

This answer is signed by two parties, one of whom verifies it by affidavit.

The purpose of the petitioners was to obtain the prohibition of the sale of liquors in the territory described, under the provisions of an act entitled an act "to further provide against the evils resulting from the traffic in intoxicating liquors, by providing for local option in residence districts of municipal corporations." 98 Ohio Laws, p. 68.

Under this petition Judge Washburn proceeded to hear and determine the various questions necessary to be determined, before it could be said that the territory described should be such as is ordinarily denominated "dry."

The burden put upon the petitioners in this hearing was to show, first, that the petition described a district in the city and county of Lorain, which was bounded by street, corporation, or other well recognized lines or boundaries.

One of the boundaries of the district described in the petition is the east rail of the Cleveland & Southwestern Electric Railway Company. It is urged that this is not such a boundary as is required by the statute. Of course it is not a street line, nor a corporation line, but it is a line which, in a sense, may be said to be akin to a street line; it is a line easily discernible, easily ascertained, and although this rail may be changed, still the line upon which it now is, is certainly easily ascertained, and it would seem to be not difficult to ascertain substantially where that line was, even though the rails should hereafter be laid along some other line. There was no error in holding as Judge Washburn did, that this was a sufficiently definite boundary line.

Second. The further burden was put upon the petitioners of showing that their petition was signed by a majority of the qualified electors, residing within the described district. The

district described in the petition does not include any one full elective precinct of the city, making it manifest that it is a matter of some difficulty to determine whether a majority of the qualified electors within the district signed the petition.

R. J. Cowley was called as a witness on behalf of the petitioners, and it appears from his testimony that he had carefully examined the poll books and the registration lists of the several precincts, some part of each of which was within the district described in the petition. That he ascertained from these books the place of residence of the several signers to this petition, and that he ascertained by the same means the other voters within this residence district, and then by mathematical calculation it was shown that the signers constituted a majority of the qualified electors, as provided for in the statute.

It is urged that the clerk of the board of elections should have been called; that this would have been the better evidence. We do not understand that this would have been the *better* evidence, in the sense of that term as used in the law. It might have been stronger evidence, but it would have been of the same nature as that given by Mr. Cowley. It can not be supposed that it was contemplated by the Legislature that the judge before whom such a petition as this could be heard, would be required to count the names on the poll books and registration lists. He might well call upon some other person to do this, or the petitioners might well call upon some other person to do this. We think the testimony of Mr. Cowley was admissible, and from that testimony the judge was justified in finding that a majority of the qualified electors within the residence district signed the petition.

Third. The further burden was put upon the plaintiffs by Section 7 of the act referred to, to show that the described district did not contain property or premises abutting on a section of a street lying between two consecutive, cross, or intersecting streets, from street to street, whereon sixty-five per cent. of the foot frontage of such abutting property on each side of such street was occupied for and devoted to manufacturing, mercantile or other business purposes.

It is urged that this burden was not sustained by the petitioners, because included within the district is a section of West

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Erie avenue, bounded on the east by Broadway, and on the west (the defendants claim) by Joubert street, and that more than sixty-five per cent. of the abutting property on each side of this section of West Erie avenue is occupied for business purposes.

The situation is this: Broadway is a north and south street. West Erie avenue is an east and west street. These two streets cross each other. West of Broadway there is a street extending from the south line of West Erie avenue southerly; this is Joubert street. Joubert street does not cross West Erie avenue, nor does any street corresponding with it extend north from West Erie avenue. On the south side of that part of West Erie avenue, between the east line of Joubert street and the west line of Broadway, it is conceded that more than sixty-five per cent. of the property is business property and it is claimed by those protesting against the petition that more than sixty-five per cent. of the property abutting on the north side of West Erie avenue, between the west line of Broadway, and a point opposite the east line of Joubert street, is occupied for business purposes.

On the part of the petitioners it is said that it is a matter of indifference whether sixty-five per cent. more or less, of this part of the north side of West Erie avenue is occupied for business purposes. The language of the statute is: "Lying between two consecutive, cross or intersecting streets."

It is clear that Joubert street is not a cross street to West Erie avenue, lying consecutive to Broadway, but it is urged that it is an intersecting street, and that is next in order going to the west from Broadway.

The word "intersect" is defined in the Century Dictionary, as follows:

"To cut or divide into parts, lying or passing across; as, the ecliptic intersects the equator. To cut apart, separate by intervening. 2. For example, 'Lands intersected by a narrow frith abhor each other.'"

Webster defines the word "intersect" in these words:

"To cut into or between; to cut or cross mutually; to divide into parts as the ecliptic intersects the equator. 2. To cut

into one another, to cut across, as the points where two lines intersect.”

Our attention is called in the brief of counsel for the plaintiff to the case of *Calhoun Gold Mine Co. v. Ajax Gold Mine Co.*, 59 Pacific, 607, 613. As this is reported in four different sets of reports, and counsel cites one of the four, it looks like rather a formidable array of authorities. However, it is but one case, and in that case the court seems to hold that leads of minerals which come together at an angle, intersect. But this does not, as we think, bear upon the construction to be given to the word “intersecting,” as used in this statute. The property, sixty-five per cent. of which has to be used for business purposes, must be between consecutive streets. We take it that on the north side of West Erie avenue there can be no property lying between Broadway and Joubert street, unless such property lies between the west line of Broadway and the east line of Joubert street. It would be absurd to say that property lies between two streets, and yet does not lie between some boundary line of each of said two streets, and it is certain that there is no property on the north side of West Erie avenue that lies between any boundary line of Joubert street and a boundary line of Broadway.

We reach the conclusion, therefore, that there was no error in the finding of the judge before whom this matter was tried, and that finding is affirmed.

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LINE FENCE LAW INVALID.

Circuit Court of Medina County.

JOHN P. BEACH V. BERT ROTH ET AL, AS TRUSTEES OF SHARON TOWNSHIP, AND SIMON DRESSLER.*

Decided, May, 1907.

Constitutional Law—Fence Law Unconstitutional.

Section 4243, Revised Statutes, providing for the building of line fences and the assessment of the cost thereof upon adjoining proprietors, is unconstitutional.

MARVIN, J.; WINCH, J., and HENRY, J., concur.

The only question involved in this case is whether Section 4243 of the Revised Statutes is obnoxious to the Constitution. The section reads:

“If either party fail to build the portion of fence assigned to him, the trustees shall, upon the application of the aggrieved party, sell the contract to the lowest responsible bidder, to furnish the labor and material and build such fence according to the specifications to be proposed by the trustees, after advertising the same for a period of ten days by setting up posters in three public places in the township. As soon as the work shall be completed in conformity with the sale, and to the satisfaction of the trustees, they shall immediately certify the costs to the township clerk and if not paid within the thirty days, the township clerk shall certify the same to the auditor of the county, the amount such fence sold for, adding the proportionate amount of cost and expenses of such sale, together with a correct description of each piece of land upon which same is assessed, and the auditor shall place the same upon the tax duplicate to be collected as other taxes are collected, and the trustees shall at the same time certify the amount due each trustee and clerk for their services rendered in such proceedings, and the auditor may anticipate the collections of same and draw orders for the payment of such amount out of the county treasury.”

This section read in connection with Section 4242, and other sections of Title 5, Chapter 3 of the statutes, authorizing the

*Affirmed without opinion, *Roth et al v. Beach*, 80 Ohio State, 746.

trustees of townships to determine what line fences shall be built outside of the municipal corporations, and in case the owners of the land bounded by the line where such fence is to be built, fail to build the portion of fence assigned to such land owner, the trustees may cause the fence to be built, and the land owner may be compelled to pay for the same, as taxes upon his land.

It is urged on behalf of the plaintiff that this is in contravention of Section 19 of the Bill of Rights (the first article of the Constitution); that section reads in part as follows: "Private property shall ever be held inviolate, but subservient to the public welfare."

It is said that under this section, the private property of one land owner may be subjected to appropriation to the extent necessary to construct a fence for the exclusive private use and benefit of an adjoining land owner, and not only that, but that the property of the owner may be taken to pay the tax assessed for the building of a fence, when such fence is exclusively for the benefit of a single individual and adjoining land owner.

This claim seems to us to be sound. A farm may be owned by A, an adjoining farm is owned by B, and A is so situated that he has no occasion for a line fence for the purpose of controlling his own domestic animals, or for any other purpose, excepting it be to protect his lands from the domestic animals of B. The policy of the law of Ohio is that each owner of domestic animals must himself see that they are kept within proper boundaries. Why then, should A in the case supposed, be required to yield any part of his land, or have his land subject to a tax, simply for the benefit of B? It seems to us that it is a violation of the constitutional provision hereinbefore quoted, that "private property shall ever be held inviolate, but subservient to the public welfare." Certainly no public welfare is to be subserved by the construction of a line fence in the case supposed.

In *Shaver v. Starrett*, 4 Ohio St., 498, it is said by Judge Thurman:

"The constitutionality of the statutory provisions for the establishment of township roads, has lately been questioned, upon the ground that the land appropriated for such roads is

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not taken for a *public* use. If this were so, the invalidity of the statute would be manifest, since the Constitution provides (Article I, Section 19), that 'private property shall ever be held inviolate,' and the only exception to this rule is, that it shall be 'subservient to the public welfare.' It follows that it can not be taken for a mere private use; nor could it, I apprehend, were there no express constitutional provision upon the subject; and this for the plain reason, to say nothing more, that no such power has been delegated to the assembly."

In that case the court held the statute, which provided for the taking of private property for a township road, to be constitutional, but upon the ground that such road was for a *public* use.

In *Reeves v. Treasurer of Wood County et al*, 8th Ohio St., 333, it is held that an act authorizing the trustees of townships to establish water-courses, etc., was in contravention of the constitutional provision referred to.

The statute under consideration authorized the construction of ditches, the language being:

"That the township trustees shall have power, on the application of any party, to enter upon any land in their township to view any water-course or proposed ditch for the purpose of draining any land held by more than one person, and to cause said ditch or water-course to be located and set apart to each person interested in such ditch or water-course, such portion of the same to be by him opened, as shall be deemed by them right and just, according to the benefit to be derived by such person from the opening of said ditch or water-course; and also to assess against him such portion of the expenses and damage hereafter provided for, as according to right and justice he ought to pay."

And in the opinion at page 347. Judge Brinkerhoff uses the following language:

"If the trustees had been authorized to locate and provide for the opening of a ditch only in case they found the same to be demanded by, or conducive to the public health, convenience, or welfare, why then their action, under legitimate authority, would be but an ordinary and legitimate exercise of the right of eminent domain. But this statute prescribes no such condition, no such rules of official duty or limit to official discretion; and a ditch may be located and opened upon the lands of individual

property owners solely for purposes of private interest irrespective of the public welfare, without infringing any provision of this act, either express or implied."

"Is this an infringement upon the inviolatability of private property, taking of private property for private use?"

The land occupied by the ditch and its banks is not, it is true, *wholly* appropriated. The owner may still use the ditch itself for purposes of irrigation, for watering stock, or perhaps make it serve the purposes of a fence. He may grow timber and shrubbery on its banks. But his dominion over it, his power of choice as to the uses to which he will devote it, are materially limited; in short other parties acquire a permanent easement in it. An easement is property; and to the extent of such easement it is clear to us, that private property is taken, within the meaning and spirit of the constitutional prohibition."

In *McQuillen v. Hatton*, 42 Ohio St., 202, Judge Follett uses this language in the opinion:

"The use that will justify the taking of private property by the power of eminent domain, is the use by or for the government, the general public or some portion of it; and not the use by or for particular individuals, or for the benefit of certain estates. The use may be limited to the inhabitants of a small locality, but the benefit must be in common, and not to a very few persons or estates.

"The prosperity of each individual conduces, in a certain sense, to the public welfare, but this fact is not a sufficient reason for taking other private property to increase the prosperity of individual men.

"The draining of marshes and ponds may be for the promotion of the public health and so become a public object but the draining of farms to render them more productive, is not such an object."

See also *Railroad v. Keith et al*, 67 Ohio State, at page 279, and following.

In *Zigler v. Menges*, 16 American State Reports, 357, there is a very full discussion as to the distinction between the public use for which property may be taken, and the private use for which it may *not* be taken, and in the notes to this case, as re-

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ported in the volume referred to, numerous authorities are quoted, and among other things this is said:

“It is not necessary, in order that a use may be regarded as public, that it should be for the use and benefit of the whole community, or any large portion of it. It may be for the inhabitants of a small or restricted locality; but the use and benefit must be in common, not to particular individuals or states.”

On the part of the defendants the case of *Tomlinson v. Bainaka et al*, 70th Northwestern Reporter, 155, is cited.

The act construed in that case was attacked on the ground that it was unconstitutional; the section providing that “private property shall ever be held inviolate,” was not construed, and whatever the holding in that case (which was an Indiana case), we feel confident that we are following the decisions of our own Supreme Court in holding as we do that the act under consideration violates Section 19, Article I, of the Constitution of Ohio.

It follows, therefore, that the plaintiff is entitled to the injunction prayed for in the case, and the same is allowed.

**VITUPERATIVE LANGUAGE NOT BASIS OF ACTION
FOR SLANDER.**

Circuit Court of Medina County.

BENJAMIN LOHR V. LYMAN C. BUFFINGTON.

Decided, May, 1907.

Slander—Special Damages to One's Business—Not Slanderous per se.

1. To make words actionable because of their effect upon one's business or office, they must be said with reference to something connected with such business or office.
2. The words, “He was a son of a bitch; he had his farm given to him and then he tried to cheat his brothers out of everything they had,” are not slanderous *per se*.

MARVIN, J.; WINCH, J., and HENRY, J., concur.

The parties here are as they were in the court below. Lohr sued Buffington for slander, alleging that Buffington said to him, in the presence of divers good people, the following words: "You put them poles back in again; if you say you had a right to you are a God damn liar. You had your farm given to you, and then you tried to cheat your brothers out of everything they have."

The petition also charges that the defendant said to and in the presence of divers good people, speaking of the plaintiff, the following words: "He was a son of a bitch; he had his farm given to him and then he tried to cheat his brothers out of everything they had."

The plaintiff says that he was, at the time these words were spoken, an officer, to-wit, a director of the Medina County Telephone Company, and that by reason of these words, he suffered in his official position.

To this petition a general demurrer was filed and sustained by the court below, and the only question here is, as to whether such demurrer should have been sustained.

We do not understand that the words spoken are such as could have affected in any wise the plaintiff in his position as such director of the telephone company. It is not alleged that it affected the business of the telephone company or that it interfered in any wise with his work as such director. Nothing is said in the words about his action as an officer of this company, and to make the words actionable because of their effect upon one's business or office, they must be said with reference to something connected with such business or office.

In *Newell on Slander*, Chapter VIII, paragraph 2, it is said:

"It by no means follows that all words to the disparagement of an officer, professional man or trader will for that reason, without proof of special damage, be actionable in themselves. Words to be actionable on this ground must touch the plaintiff in his office, profession or trade. They must be shown to have been spoken of the party in relation thereto, and to be such as would prejudice him therein.

"It is true that words may be of such a character imputing dishonesty and fraud as necessarily would injure one in any

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position of trust or confidence, as in Section 37 of the chapter referred to in Howell on Slander, it is said:

“ ‘But when they convey only a general imputation upon his character, equally injurious to any one of whom they might be spoken, they are not actionable unless such application be made.’ ”

This is a quotation from the opinion of Andrews, Judge, in the case of *Sanderson v. Caldwell*, 45 New York, 398.

In *Goldsmith v. Levy*, 8th Ohio Dec. (Reprint), 146, it is said:

“ ‘Mere vituperative language of general abuse of a professional man is not actionable, unless it has reference to his conduct in his profession.’ ”

We think it clear that unless the words charged in this petition as having been spoken of the plaintiff are actionable *per se*, the demurrer was properly sustained.

We come then to consider whether the words are actionable *per se*.

In *Hollingsworth v. Shaw*, 19 Ohio St., 432, it is said:

“ ‘Words to be actionable, must either have produced a temporal loss to the plaintiff in special damage sustained or they must convey a charge of some act criminal in itself, and indictable as such, and subjecting the party to an infamous, more especially a corporal punishment; or some indictable offense involving moral turpitude.’ ”

In *Brown v. Myers*, 40 Ohio St., 99, it is said in the syllabus:

“ ‘An action of slander can not be maintained for words which impute a crime, where, from all that was said at the time the words were spoken, it appears that the words had relation to a transaction that was not criminal, and that they must have been so understood by the hearers.’ ”

In *Hollingsworth v. Shaw*, 19 Ohio St., at 431, it is said in the syllabus:

“ ‘An action of slander can not be maintained for calling the plaintiff a deserter, without averment and proof of special damage.’ ”

And in the opinion in that case Judge Scott uses this language:

“These authorities and the general current of decisions, warrant us in saying that to render words actionable *per se*, on the ground that they impute criminality to the plaintiffs, they must first, be such as charge him with an indictable offense; and, high degree of moral turpitude or subject the offender to infamous punishment.”

From these authorities, and the several cases cited, to which attention has been called, we come to the conclusion that the words charged in this petition are not actionable *per se* and having already found that they are not actionable by reason of any special damage alleged to have been sustained by the plaintiff, the demurrer was properly sustained, and the judgment is affirmed.

NEGLIGENCE IN DRIVING ONTO A RAILROAD CROSSING.

Circuit Court of Summit County.

THE BALTIMORE & OHIO RAILROAD COMPANY V. ERNEST S.
DICKINSON.*

Decided, 1906.

Railroad Crossing—Contributory Negligence—Evidence that Railroad is Operating Trains.

1. It is sufficient evidence that one railroad company is operating trains over the line of another railroad company, as lessee, or otherwise, that it issued a bill of lading for freight consigned to it at a station on the line, published and issued a time table of trains thereon, representing them to be its own trains, and hired and paid a doctor to treat a person injured thereon.
2. One who drives into a deep cut leading to a railroad crossing with a lumber wagon which makes so much noise that he can not hear an approaching train, and who knows that he can not see one while in the cut, is guilty of contributory negligence if he does not slow down his horses as he emerges from the cut upon the track, to see if a train is approaching.

Allen, Waters & Andress, for plaintiff.

Rial M. Smith, contra.

*Affirmed without opinion, *Dickinson v. B. & O. R. R. Co.*, 77 Ohio State, 639.

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MARVIN, J.; WINCH, J., and HENRY, J., concur.

Dickinson brought a suit against the Baltimore & Ohio Railroad Company and the Cleveland Terminal & Valley Railroad Company. He sets out that a line of railroad extending south from the city of Cleveland and through the township of Brecksville, in Cuyahoga county, is owned by the Cleveland Terminal & Valley Railroad Company; that that road is leased to and operated by the Baltimore & Ohio Railroad Company; that on the 24th day of April, 1903, the plaintiff below, Dickinson, was driving along a public highway in the township of Brecksville, which crosses the line of railroad already spoken of at what is known as Vaughan's Crossing, that by reason of the negligent manner in which a train was operated he was struck and injured while making that crossing over the road. He complains of three acts of negligence on the part of the railroad company: *First*, that it failed to keep gates or station a flagman or watchman at the crossing, which he says was a very dangerous crossing. *Second*, that the railroad company was negligent in that it ran its train at the rate of more than forty miles an hour at this place on its line, and that to run a train at that rate of speed at such a crossing was negligence. *Third*, the company was negligent in that it failed to sound the whistle and ring the bell in pursuance of the statute which requires the whistle to be sounded and the bell to be rung. Upon the trial of the case, however, the charges of negligence for failing to keep the gates and a flagman was dropped, and the charge of negligence for running the train at a high rate of speed was taken out of the case, so that there remained the charge of negligence that the company failed to give the signal which it should have given. The result of the trial in the court of common pleas was a verdict for the plaintiff below, Dickinson. A judgment was entered upon that verdict, and a motion to set aside the verdict and grant a new trial was overruled.

The Baltimore & Ohio Railroad Co. denied that it was the lessee of this line of road and that it was operating the road. Each of the defendants denied that there was any negligence on its part, and charged that there was negligence on the part of

the plaintiff below contributing to or causing the injury which he sustained. The result, as I have said, was a verdict for the plaintiff below, and that verdict was against the Baltimore & Ohio Railroad Co. only. The jury returned a verdict for the Cleveland Terminal & Valley Railroad Company, so that it is the Baltimore & Ohio Railroad Co. only that comes here claiming error to its prejudice in the trial in the court below.

It is urged on the part of the plaintiff in error that there was no evidence introduced in the trial tending to show that the Baltimore & Ohio Railroad Company was the lessee of the line of road and operated it. In this we think the plaintiff in error is wrong. There was evidence that showed that and from which the jury might find that the Baltimore & Ohio Railroad Company was operating this railroad under some contract with the Cleveland Terminal & Valley Railroad Company. There was the evidence contained in Exhibit K, at page 211, which is a bill of lading issued by the Baltimore & Ohio Railroad Company for freight consigned to it at Boston Mills, a station on the line of the Cleveland Terminal & Valley Company.

At page 138 of the bill of exceptions there appears Exhibit J, which is a time table folder shown to have been issued by the Baltimore & Ohio Railroad Company, and that time table gives as one of the lines on which the times are specified in the exhibit, this line of the Cleveland Terminal & Valley Company. There is the testimony of Doctor Jacobs that he was the surgeon in the employ of the Baltimore & Ohio Railroad Company, and that he attended the plaintiff below for the injuries which he sustained, and was paid for it by the Baltimore & Ohio Railroad Company. From this evidence the jury might well have found that the Baltimore & Ohio Railroad Company was the lessee or was operating this line of road.

It is further urged that no negligence was shown on the part of the Baltimore & Ohio Railroad Company, or any company operating the train which struck and injured the plaintiff below. It is said that there is nothing in it to show that whoever operated that train was negligent. We think that that position is not well taken. The testimony of Mrs. Vaughan, who was at the

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north end of her house near this crossing, tends to show that no whistle was blown until the engine had reached a point within a few hundred feet of the crossing, a point much nearer to the crossing than the statute requires the whistle to be blown, and much nearer to the crossing than a train, running at the speed at which that train was running, should have blown it. Other witnesses testify to the same thing. The man who was in the corn field with his team, whose name at this moment is not recalled, testified tending to show that the whistle was not blown until the crossing was nearly reached. It is true that is contradicted. The engineer says that he blew the whistle at the whistling post. The fireman says that the custom was to blow it there, and thinks it was blown; he first says it was blown, but upon cross examination he says: "We always blew it there." Really it is evident from his examination that he does not certainly remember that the whistle was blown. In this conflict of evidence the jury might well have found that the signals were not given as required and as they should have been given, so that we think the jury were not clearly wrong in finding that there was negligence on the part of the railroad company.

But it is said that clearly there was negligence on the part of the party injured, Dickinson, which should prevent a recovery, and on this question there is no principle of law involved in this case that is not familiar to every lawyer. If Dickinson contributed by his negligence to this injury, or if his negligence alone caused his injury, then he was not entitled to recover. The situation as shown by his testimony is, that he was familiar with this crossing; that there was a cut in the highway leaving a bank on each side so high that when one was near to the railroad it was impossible to see a train on the track in either direction to the north or to the south for the line of railroad was north and south and the crossing was on an east and west road. At a point sixty or sixty-five feet back from the railroad it was possible to see along that track to the north for a little distance. Dickinson says he looked there, and if he had thought, he might have known he could look well there and not see a railroad train that was not near to this crossing; it might be further away than

his point of vision would reach along the track, or it might be nearer; the train might be coming at a point at which he could not see or else had already passed his point of vision. When he got nearer to the track, within forty feet, he knew, he says, when he looked he could not see along the track, south; he did not hear anything and he continued to drive on. He was familiar with this crossing, he knew that trains passed there frequently. He knew that by exercising his faculty of seeing he would not be able to see a train, if it was coming, when he was forty. and from that on until he was perhaps twenty feet from the track, yet he did not stop his team; he drove right on. He was driving with a lumber wagon which made so much noise that Mrs. Vaughan, who was at a distance in the neighborhood of one hundred feet from that wagon, heard it. He knew his wagon was making that noise, he knew trains were liable to come along there, he knew he could not see them if he looked and that, therefore, he must depend upon his sense of hearing for knowledge of the approach of a train, if one was coming. He seems to have relied upon his sense of hearing, of hearing the whistle, presuming that the railroad company would whistle, and that he would hear that whistle, and that the distance of the train from the crossing when the whistle was given would be such that he would certainly hear it.

Now, can any man who exercises proper caution in the care of himself and his family and his property say that it would do for one under such circumstances, knowing that he could not see a train if it was coming, and that his wagon was making so much noise that he would not hear, to drive on that way and then claim that he exercised ordinary prudence and care? It seems to us clear that the plaintiff below, by his negligence in not stopping his team, or at least holding his horses to such gait that the rumbling of his wagon would cease, directly contributed to his injury. We do not think that his negligence was the sole cause, but it contributed with the negligence of the Baltimore & Ohio Railroad Company, or whatever company was running that train, to bring about the injuries and that being so, the motion which was made at the close of the evidence offered

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on the part of the plaintiff to take the case from the jury should have been sustained. It was not sustained, and there was error in that; and there was error in overruling the motion for a new trial on the ground that the verdict was not sustained by sufficient evidence and was against the weight of the evidence. That being so, we feel it our duty not only to reverse this judgment, but to enter the judgment which the court below should have entered for the Baltimore & Ohio Railroad Company, and that will be done and an exception noted for the defendant in error.

**ACTION FOR RECOVERY OF BALANCE CLAIMED TO BE DUE
ON AN INSURANCE POLICY.**

Circuit Court of Summit County.

LAURA E. WALKER V. THE EMPIRE LIFE INSURANCE COMPANY.

Decided, April 21, 1905.

Insurance—Settlement for Less than Face of Policy—Tender of Amount Received—Action for Balance.

A petition which recites that the plaintiff was entitled to receive the sum of \$3,000 from an insurance company on a policy for that amount issued on the life of her father, but that by the fraud of the company she was induced to accept \$2,000 in full for her claims under the policy, and asking judgment against the company for the balance of \$1,000, does not present a case in tort, for damages arising from the fraud, but is on the contract of insurance and can not be maintained until the \$2,000 paid by the insurance company has been returned or tendered to it.

Tibbals & Frank, for plaintiff in error.

Grant & Sieber, contra.

MARVIN, J.; WINCH, J., and HENRY, J., concur.

This case comes here upon proceedings in error. Suit was brought in the court of common pleas by Laura E. Walker against the defendant, the Empire Life Insurance Company. To the petition the defendant filed an answer and to that answer the plaintiff replied.

The pleadings being in that situation, the insurance company filed a motion for judgment on the pleadings. The court sustained the motion, dismissing the plaintiff's petition and entering judgment for defendant for its costs.

The petition sets forth that the defendant is a corporation, etc., doing a life insurance business; that on or about the 14th day of April, 1897, in consideration of the payment of monthly premiums the exact amount of which is unknown to this plaintiff, but is well known to the defendant, said defendant did then and there execute and deliver to this plaintiff its written policy of insurance whereby it, the defendant, did insure the life of Samuel N. Shaffer, plaintiff's father, for the sum of three thousand dollars; and did then and there promise to pay this plaintiff said sum of \$3,000 within three months after satisfactory proof of the death of said Samuel N. Shaffer was made out and furnished to the defendant upon its blank forms therefor provided. She says that she is unable to state the exact date and number of the policy for reasons which are set up later in the petition. She says that the contract of insurance had a provision written in it providing, in substance, that the representations, waivers and agreements contained in the written application made by said Samuel N. Shaffer for said contract of insurance were a part of said policy, and that the said representations, waivers and agreements in said written application were warranted to be true by the insured, and were binding not only upon him but upon his legal representatives, and every other person acquiring an interest in said policy, including this plaintiff to whom the same, by its terms, was payable; and all said statements, representations, waivers and agreements were to be regarded as material and to be full and true warranties, and to be the only statements and conditions upon which said policy was issued. She says that Samuel N. Shaffer died about the 13th of March, 1902; that proper proofs of his death were made to the insurance company; that a representative of the company came to see her, and represented to her that certain of the statements made by Shaffer in his application for the insurance were not true. That it was not true, as represented in said applica-

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tion, that Shaffer had not within five years previous to his application therefor, been ill with rheumatism, pneumonia and grippe, and that he had not been treated by any physician for any such disease, but insisted to her that Shaffer had been ill from some of these diseases at least, and that a physician, Doctor Carter, the family physician, had treated him for grippe and pneumonia within five years previous to the date of the application, and that by the terms of his application for insurance the insured had represented and warranted that he had not been so sick, etc.; and, therefore, that the company was not liable in any sum to the plaintiff. She says that by reason of those representations made to her by Wilson she was induced to and did accept \$2,000 in full payment of the amount coming to her under the policy and delivered the policy over to the representative of the insurance company. But she says that these statements made to her by the representative of the company were not true; that a fraud was perpetrated upon her in that wise, and that she has been damaged and wronged in the sum of \$1,000 by reason of these representations so made to her by the representative of the insurance company.

The insurance company admits the issuing of the policy, admits that Shaffer died and that proofs were made. Admits that one Willson, and not Williams, as alleged in the petition, came to Akron; that he met the plaintiff; that he offered to pay her \$2,000 on said policy and no more, and that she then and there accepted the sum of \$2,000 in full satisfaction of all claims made by her on account of said policy and duly surrendered the same to this defendant.

The company further says that the application upon which the said policy of insurance was issued, and which, by the terms of said policy, was made a part thereof, in answers to questions therein contained, that the said insured did say that he had not been ill and that he had not been treated by a physician, and the like, and they say that the representations that he made were not true, and that they were thereby relieved from payment, but that they paid \$2,000 in compromise of the claim.

Then by cross-petition they set out the payment of \$2,000 taken and kept by the plaintiff, and they pray to have that restored to them.

To that the plaintiff replied, denying all the new matter set out in that answer.

Then the defendant made this motion:

“The said defendant hereby dismisses, for the purposes of this motion, its cross-petition herein, and thereupon moves the court for judgment dismissing the plaintiff’s petition, and for its own costs in this behalf made, upon the pleadings on file herein, to-wit, the petition of the plaintiff, the answer of the defendant, and the reply of the plaintiff to this answer.”

Of course, the claim made on the part of the defendant is that there was a dispute between these parties, the plaintiff claiming that the defendant was indebted to her in the sum of \$3,000; the defendant denying that it was indebted to her in any sum whatever; that a compromise of that dispute was made by payment to the plaintiff by the defendant the \$2,000; and that this action must either be in effect a suit to set aside that contract of settlement so made, or a suit upon this policy of insurance. If it is made for the purpose of setting aside the contract so made, then that the plaintiff, before she is entitled to any such relief, must tender back to the insurance company the money that it has paid and let them start out anew upon the dispute that there was between them, and that if she chooses to affirm and hold on that by holding on to the \$2,000 she affirms the contract that was made; refuses to give anything back, but says: “I want something more.”

Counsel on both sides seem to recognize that the case of *Manhattan Life Insurance Company v. Burke*, 69 O. S., 294, at least has a bearing on the question here; and on the part of the defendant it is claimed that it settles the controversy and settles it against the plaintiff, and we think that view is correct. The first paragraph of the syllabus reads:

“Where at the time of a compromise of a claim founded on a contract of life insurance, a dispute exists between the parties as to the liability of the company in any sum whatever, it denying that anything is owing, and an amount less than the claim

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is paid to the claimant in settlement of the controversy, and he executes a full acquittance and release, and surrenders the policy, and an action at law on the policy can not be maintained without a return or a tender of the amount received, and even though the party's assent to the settlement was obtained by the fraudulent representations of the other party, and the amount received as the settlement is in the petition credited to a payment on the policy."

The opinion in this case was prepared by Judge Spear. Of course, it is conceded on the part of the plaintiff here that if this is a suit on this policy, the case of *The Manhattan Life Insurance Company v. Burke* must apply and must settle it against her. But she says: I have brought a suit for a fraud perpetrated upon me; that is to say. I have been damaged in the sum of a thousand dollars because of the misrepresentations made by Willson to me. But really is that the substance of it? Is there anything in the claim that this is not a straight suit upon this policy? The only reason in the world why the insurance company owes this plaintiff anything, if it does owe her anything, is that it entered into a contract by which it agreed to pay her three thousand dollars, and it failed to pay it. If it does not owe her because of that contract it does not owe at all. If it owes because of that contract. or if there is an open question as to whether it owes upon that contract, then it must not be permitted to the plaintiff to retain what she has received upon it and prosecute her action for more.

We think the case of *The Manhattan Life Insurance Company v. Burke* is directly in point, and that it disposes of this case in favor of the defendant, and that the judgment of the court of common pleas was right, and is affirmed.

INJURY TO PERSONS WALKING ON RAILWAY TRACK.

Circuit Court of Summit County.

THE C., A. & C. RAILROAD COMPANY V. PATRICK BROWN.

Decided, April 21, 1905.

Negligence—Railroad Crew Running Down Person on Track—Special Finding.

In an action for damages against a railroad company for negligently running down and injuring a person walking on the track, where the case turned upon the question whether the crew in charge of the engine, after they discovered that the plaintiff was in danger of being struck by the engine used all reasonable efforts to prevent the accident to him, or not, and that question was submitted to the jury for a special finding thereon and the jury answered, "We can not tell," the plaintiff is not entitled to a recovery.

MARVIN, J.; WINCH, J., and HENRY, J., concur.

The defendant in error was severely injured on the 21st of September, 1901, by being struck by an engine of the plaintiff in error at a point a short distance south of the city of Akron. At the same time one Jenkins, who was with Brown, was killed; the two men were together. Suit was brought by the administrator of the estate of Jenkins; a recovery was had and judgment entered for the administrator. Upon proceedings in error prosecuted by the railroad company in this court that judgment was affirmed; to that judgment of affirmance the railroad company prosecuted error to the Supreme Court, where the judgments of both this court and the court of common pleas were reversed and judgment was entered for the plaintiff in error. In the mandate issued by the Supreme Court, this language is used:

"It is considered and adjudged that upon the special finding of the jury and the conceded facts appearing of record, the plaintiff in error was entitled to a judgment in the court of common pleas against the defendant in error."

The special finding referred to consists of the following interrogatory submitted to the jury, and its answer:

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“After the crew in charge of the engine discovered that Jenkins was in danger of being struck by the engine, did they use all reasonable efforts to prevent the accident to Jenkins?”

“Answer. Yes, but too late on account of not keeping a proper lookout.”

Substituting the name “Brown” for “Jenkins” the same interrogatory was submitted to the jury in the present case, and this was answered in these words: “We can not tell.”

It can hardly be claimed that this was more favorable to the plaintiff below than the answer in the Jenkins case was to the plaintiff in that case. Here the jury were unable to say that the engine crew did not use all reasonable care to prevent the accident after they knew of Brown’s danger, and Brown was not entitled to recover on account of the negligence of the crew, after discovering his perilous condition without an affirmative finding that it failed to use such care.

In the Jenkins case they found such care was used but that the discovery came too late for want of a lookout.

As has been said, before a recovery could be had, on account of negligence of the crew, after discovery, the jury must have found that there was such negligence; this they said they could not do.

In the Jenkins case the jury said the discovery came too late, for want of proper lookout; this finding is not made in this case.

Whatever facts were *conceded* by the plaintiff in the Jenkins case which are not conceded by plaintiff here, we find none which can aid the defendant in error.

It is urged that the evidence here shows that the engine could be stopped in a very short distance and that the testimony of Hillier found on page 98 as to what the engineer said after the accident, are items of evidence which were not in the Jenkins case. The testimony of Hillier is that he heard the engineer say after the accident that he, the engineer, saw two men on the track; that he slackened up a little and then supposing that they left the track, he put on a little more steam. These two items bear only on the question of whether the crew on the engine did their duty after they knew of the peril of Brown, and the

jury have said that they could not find that the crew failed to do its duty.

The case is so exactly parallel with the Jenkins case that we feel that the judgment can not be affirmed without wholly disregarding the judgment of the Supreme Court in that case, and this, of course, we are not at liberty to do.

We also feel that it would be idle to reverse the judgment and remand the case for further proceedings, but that our plain duty is to follow the example of the Supreme Court and reverse this judgment for error in overruling the motion for a new trial, and enter final judgment for the plaintiff in error, which will be the order.

PROSECUTION OF A DRUGGIST UNDER THE MUNICIPAL LOCAL OPTION LAW.

Circuit Court of Cuyahoga County.

THAD H. ROWLAND V. STATE OF OHIO.*

Decided, April 30, 1908.

Municipal Local Option Law—Constitutional Law—Prosecution of Druggist.

1. In the prosecution of a druggist for violating the Municipal Local Option law of 1902 (95 O. L., 87), it is not sufficient to charge that he sold intoxicating liquor upon a written prescription and that the sale was not made by him in good faith for medicinal purposes, without alleging that it was known to him that the liquor would be used for other than the purpose the prescription called for, or some other fact tending to show that it was not sold in good faith.
2. In such a case, where the charge is that the druggist sold the liquor upon a prescription which had been used before, it must also be stated that he knew the prescription had been used before and liquor obtained upon it.
3. In such a case, where the druggist is charged with failure to cancel the prescription upon its first use, it must be stated that it was first used with him.
4. The Municipal Local Option law of 1902 (95 O. L., 87) is constitutional.

*Affirmed without opinion, *Rowland v. State*, 80 Ohio State, 711.

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MARVIN, J.; WINCH, J., and HENRY, J., concur.

Rowland was prosecuted before the mayor of the village of Oberlin upon charges made in an affidavit, to which particular attention will be later given in this opinion. As a result of this prosecution he was found guilty and sentenced to pay a fine of \$150.

Proceedings in error were prosecuted in the court of common pleas, resulting in an affirmance of the judgment of the conviction and sentence.

To this affirmance error is prosecuted in this court.

There are four charges in the affidavit; the first reads:

“*First.* That on or about the 6th day of August, A. D. 1907, in the village of Oberlin, Lorain county, Ohio, Thad H. Rowland being then and there a regular druggist, did then and there unlawfully sell intoxicating liquors to one Paul Long upon a written prescription. That the sale of intoxicating liquor by the said Thad H. Rowland was not then and there made in good faith for medicinal purposes, and that the selling of intoxicating liquor as aforesaid by the said Thad H. Rowland was then and there prohibited and unlawful and contrary to an act passed April 3, 1902 (95 Ohio Laws, p. 87), known as the Municipal Local Option law, and against the peace and dignity of the state of Ohio.”

On the part of the plaintiff in error it is urged that no facts are here stated which constitute an offense under the laws of Ohio. The affidavit sets out the holding of an election under the statute of 1902, in the village of Oberlin, resulting in favor of prohibiting the sale of liquor within the municipality and then the charge as hereinbefore quoted.

Section 4364-20c, Revised Statutes of Ohio, makes exceptions in favor of druggists in these words:

“But nothing in this act shall be construed to prevent the selling of intoxicating liquors at retail by a regular druggist for exclusively known medicinal, pharmaceutical, scientific, mechanical or sacramental purposes; and when, sold upon written prescription issued, signed and dated in good faith by a reputable physician in active practice and the prescription used but once.”

How it can be claimed that anything is set out in this charge which is in violation of the statute, it is difficult to understand. The language is that liquor was sold upon a written prescription, but that the sale was not made in good faith for medicinal purposes. It is not sufficient to say that the sale was not made in good faith, without some allegation that it was known to the seller that it would be used for other than the purpose the prescription called for, or some other fact tending to show that it was not sold in good faith. It is not sufficient to simply state the conclusion that it was not sold in good faith; so, as to this charge, we find that it does not set out facts that constitute an offense under the statute.

The third charge is in these words:

“That on or about the 8th day of August, A. D. 1907, in the village of Oberlin, Lorain county, Ohio, one Thad H. Rowland, being then and there a regular druggist, did then and there sell intoxicating liquor to one Paul Long, upon a prescription which had been used theretofore, and intoxicating liquor secured theretofore by the means of said prescription.”

The charge here sought to be made is under the same statute. It will be noticed here that the charge is that the liquor was sold upon a prescription which had already been used.

The exception in favor of the druggist provides that the prescription shall be used but once, but there is nothing in the charge to indicate that Rowland had any knowledge that this prescription had ever been used, and intoxicating liquors obtained thereupon, so that everything in the charge may be true and Rowland be entirely innocent, for except he had knowledge that the prescription had already been used and liquor obtained upon it, surely it was not a crime in him to furnish liquor upon the prescription. The party using the prescription has a right to use it once. Except that the druggist has knowledge that the prescription has already been used, it would be a great hardship to say that he should be punished for furnishing liquor upon it, and such was not the intention of the Legislature.

The fourth charge is like the third, except that after averring that the liquor was sold upon a prescription which had been

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used theretofore, the words follow: "and was not canceled by the said Thad H. Rowland when said prescription was first used." It is provided by the act of February 23, 1906, under which this charge is made that a record shall be kept of the sales made, and that the prescription when used, shall be canceled, and a penalty is provided for failure to make such cancellation. However, in the charge now under consideration for aught that appears, it was some other person than Thad H. Rowland who should have canceled the prescription when it was first used. The allegation simply is that the liquor was furnished upon a prescription which had before that time been used and that it was not canceled by Thad H. Rowland when it was used the first time. But it could be said of a druggist who had never seen the prescription at all that it was not canceled by him just as well as to say that it was not canceled by Rowland. Rowland may never have seen the prescription at all before this and still all that is contained in the charge be true. We think that there is nothing in this charge showing a violation of the statutes of Ohio.

The second charge, however, in the affidavit is in these words:

"That on or about the 6th day of August, A. D. 1907, in the village of Oberlin, Lorain county, Ohio, in which village the sale of intoxicating liquor was then and there prohibited, one Thad H. Rowland, being then and there a retail druggist and pharmacist, did then and there sell intoxicating liquor upon prescription to one Paul Long; that the said Rowland did not then and there make any record in a book of said sale, as required by law."

This we hold, to be a distinct violation of the statute of February 23d, 1906, which provides that whenever a pharmacist or druggist sells liquor under a prescription, a record shall be kept of the sale in a book provided for that purpose. Here the charge is distinctly made that the statute was violated. Indeed this is not seriously denied by the plaintiff in error but it is urged that the statute is unconstitutional in that it, in effect, by the exception in favor of druggists and pharmacists, permits a license to be given to traffic in intoxicating liquors. Without entering into a discussion of this question, we feel that though it is not free from doubt we are by no means clear that the Con-

stitution is infringed. We have, in a case involving this question in Cuyahoga county, held the statute to be constitutional, and we understand that it has been so held in two of the other circuits of the state, and we have no information that it has ever been held otherwise. We adhere to our former holding, therefore, that the statute is not in violation of the Constitution.

The penalty imposed is, as has been stated, a fine of \$150. This is not in excess of the fine allowed for the offense of failing to make record of the sale, as contained in the second charge. In the case of *Bailey v. State of Ohio*, 4th Ohio State, p. 444, the last clause of the syllabus reads:

“Where the defendant is found guilty on several distinct counts of the indictment, some of which are bad and some good, a judgment and sentence in general terms, on such a verdict, is not erroneous, provided the sentence be proper, and warranted by the laws applicable to the good counts.”

The concluding part of the opinion in that case reads, at page 445:

“In the case before us, the judgment and sentence of the court would have been proper under either the third or the fifth count of the indictment, the sufficiency of either of which is unquestioned. Inasmuch, therefore, as the verdict was equivalent to a general verdict of guilty on the five first counts of the indictment, and the sentence was warranted by the law applicable to the offense charged in the good counts, the presumption of the law prevails that the court awarded judgment on the good counts.”

It follows since the facts upon which the conviction was had are not before us, that the judgment of affirmance in the court of common pleas must be affirmed.

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PROCEDURE IN REPLEVIN CASES.

Circuit Court of Lorain County.

**THE J. D. SMITH FOUNDRY & SUPPLY CO. V. THE LORAIN COUNTY
BANKING COMPANY.**

Decided, April 29, 1908.

*Replevin—Trial by Court—Right of Property or Possession Must be
Found Before Judgment for Defendant Can be Entered.*

In an action in replevin, where the issues are submitted to the court without the intervention of a jury, it is error for the court to find for the defendant and assess his damages without first finding whether, at the beginning of the action the right of property, or the right of possession only, was in the defendant, and this finding must be carried into the judgment entry.

MARVIN, J.; WINCH, J., and HENRY, J., concur.

The record in this case, for our consideration, consists simply of the transcript from the court of common pleas. The original pleadings were not filed in this court, nor have we any bill of exceptions. A motion is made here by the plaintiff in error for leave to file the original pleadings. That motion is denied. The statute provides, Section 6716, that:

“The plaintiff in error shall file with his petition either a transcript of the final record, or a transcript of the docket and journal entries, with such original papers or transcripts thereof as are necessary to exhibit the error complained of.”

Whether or not we might, in our discretion, permit the filing of the original papers at this time, it is not necessary here to consider. We have before us a transcript of the docket and journal entries of the court of common pleas, and if from those we find that there was error in the proceedings of the court, the judgment must be reversed.

We do find that the action was in replevin. This we find from the entry of February 19, 1907, which reads, “Original papers from C. C. Lord’s docket to-wit, affidavit in replevin, writ of summons, replevin bond by plaintiff, and by defendant filed.”

We find also from this entry that a bond was filed by the plaintiff in replevin. We further find from this transcript, by the entry of October 1, 1907, that:

“On the application of the defendant, Charles Cahoon, as constable, and the Lorain County Banking Company, that the said the Lorain County Banking Company might be substituted as the defendant in such action and it appearing to the court that the said the Lorain County Banking Company is the party in whose favor the attachment issued in the lower court, it is therefore ordered, adjudged and decreed that the defendant, the Lorain Banking Company, be substituted as a party and in the place of the said constable, and that the defendant be allowed to file an answer herein instanter.”

We find here that at the trial a jury was waived by all parties, and that the cause came on to be heard before the court upon the petition of the plaintiff and the answer of Charles A. Cahoon, constable, and the Lorain County Banking Company and upon the evidence presented by plaintiff herein. At the close of plaintiff's evidence, and after said plaintiff had rested, the said defendants moved the court for judgment for the defendants; thereupon the court, after argument by counsel, found the plaintiff had failed in its evidence to sustain the material allegations of its petition, and thereupon, upon the application of the defendants found that the damages sustained by the said defendants were in the amount of \$350.

“Wherefore it is ordered, adjudged and decreed that the defendant, Charles A. Cahoon, recover of the plaintiff the said damages aforesaid in the sum of \$350, for which judgment is hereby entered together with the costs of the suit.”

There are matters shown on this transcript which seem to be, in some degree at least, original. The banking company was substituted as a defendant in the action for Cahoon, who was sued originally as a constable. Cahoon afterwards was permitted to file an answer, and the transcript shows that such answer was a general denial. What the answer of the Lorain County Banking Co. was we can not know, because the original files are not before us. The judgment is in favor of Cahoon, but not in terms as constable, and that judgment was in his

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favor, after another party had been substituted in his stead as a defendant. However, the difficulty in the case is that the issues having been submitted to the court without the intervention of a jury, the court proceeded to render a judgment for the defendant, without having first found whether it was the right of property or the right of possession which was in the defendant in whose favor the judgment was rendered.

Section 5826, Revised Statutes of Ohio, provides:

“When the property is delivered to the plaintiff or remains in the hands of the sheriff, as provided in section fifty-eight hundred and twenty, if the jury, upon issue joined, find for the defendant, they shall also find whether the defendant had the right of property, or the right of possession only at the commencement of the suit; and if they find either in his favor, they shall assess to him such damages as they think right and proper, for which, with costs of suit, the court shall render judgment for the defendant.”

The purpose of this section is manifest, that in case the right of property is found in the defendant, and it has been taken in the proceedings in replevin by the plaintiff, the defendant will be entitled, as his damages, to the value of the property. If the right of possession only is in the defendant, it may be that his damages will be much less than the value of the property. For he may have the right of possession as a pledgee, or in some such way as that, but under such circumstances he would not be entitled to the entire value of the property which was taken from him. For the same reason that the jury are required to find whether it is the right of property or the right of possession which they find in the defendant, where the judgment is in his favor, the court would, when the matter is submitted to it without the intervention of the jury, find whether it is the right of property or the right of possession that is in the defendant. If it be said that where a judgment is rendered for the defendant, it must be presumed that the court made the right finding as to whether the right of property or the right of possession only was in the defendant, still the judgment fails to fix which it is, and surely the intention of the statute is that it shall be known by the judgment whether it is the one or the other that is found

in the defendant. In the case of *Wolf v. Myer*, 12 Ohio St., 432, this is said by the court, quoting from the statute:

“In all cases where the property has been delivered to the plaintiff, where the jury shall find upon issue joined for the defendant, they shall also find, whether the defendant has the right of property, or the right of possession only, at the commencement of the suit.”

Then follows this language by the court:

“It is error for the court, in such a case, to assess the defendant's damages, without the intervention of a jury, and without finding whether the defendant had the right of property or the right of possession only, at the commencement of the suit.”

It will be seen by this that if the jury is dispensed with, then the court doing that which the jury (if there is a jury) is required to do, must find affirmatively whether it was the right of property or the right of possession only which was in the defendant at the time of the commencement of the action.

For error in entering judgment for the defendant without having first found whether the right of property was in the defendant or the right of possession only, the judgment is reversed and the cause remanded to the court of common pleas.

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Hamilton County.

NO STENOGRAPHER PRESENT AT A CRIMINAL TRIAL.

Court of Appeals for Hamilton County.

ROY AUSTIN V. STATE OF OHIO.

Decided, March 15, 1913.

Criminal Law—Not Error to Try a Case Without an Official Stenographer to Report the Testimony, When—Section 1548.

Section 1548, General Code, does not make it mandatory upon a trial judge to provide the defense in a criminal case with an official stenographer, and a judgment of conviction will not be reversed for failure so to do, where it appears there was no official stenographer available at the time, and no claim is made that the verdict is against the weight of the evidence, or that the defendant was not proved guilty beyond a reasonable doubt, or that any manifest injury resulted to the defendant through failure to have a stenographer in attendance.

Howard D. Burnett, for plaintiff in error.

Simon Ross, Jr., contra.

JONES, O. B., J.; SWING, J., and JONES, E. H., J., concur.

Plaintiff in error, who was convicted of grand larceny, seeks to set aside this conviction solely because he was not furnished the services of an official stenographer to report all the testimony at the trial.

The bill of exceptions recites that upon the calling of the case for trial on the day on which it had been regularly set for trial, the defendant objected to being put to trial on that day for the reason that:

“First. Written application was made by the counsel for the defendant for an official stenographer to report the evidence and proceedings in said trial. No official stenographer being available, the court ordered the defendant to proceed to trial without said stenographer, to which objection was made and exception noted. The court directed counsel to take full notes of the evidence and stated that he would do likewise, as it was impossible to get a stenographer and numerous cases were ready for trial.”

It does not appear that counsel for defendant had made any effort prior to the actual time of trial to arrange for an official stenographer, or finding all of the official stenographers engaged in other cases at that time to provide for an outside stenographer. Nor is it claimed that the verdict was against the weight of the evidence or that defendant was not proved guilty beyond a reasonable doubt, or that any manifest injury has resulted to defendant by reason of his not being able to have an official stenographer.

Defendant claims that General Code, 1548, makes it the mandatory duty of the trial judge to furnish him an official stenographer upon his request or to continue the case, and that the failure to do so constitutes reversible error. We do not so regard it.

Finding no error in the record, judgment is affirmed.

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